United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7457

IN THE

United States Court of Appeals

For the Second Circuit

CARL E. PERSON,

Plaintiff-Appellee,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

UNITED STATES COURT OF APPEALS
FILED
NOV 17 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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Docket Entries — C. PERSON VS THE ASSOC. OF BAR OF THE CITY OF N.Y. ET AL

BEST COPY AVAILABLE

DATE	PROCEEDINGS — JA 1	
9-8-75	Complaint filed. Summons issued.	(1)
9-[illegible]-75	Summons returned and filed/executed.	(2)
10-3-75	By NEAHER, J.-Stip. on Order dtd 10-2-75 that the time of all defys to answer is extended to 10-28-75 filed. (mg)	(3)
10-[illegible]-75	ANSWER of The Assoc. of the Bar of the City of N.Y. filed. (for all defts but the Bar of the City of N.Y.)	(4)
10-28-75	ANSWER of Louis J. Lefkowitz/filed.	(5)
11-17-75	Notice of deposition of Business Rountable filed.	(6)
11-19-75	By PLATT, J. - Order dtd 11-14-75 extending time for the Association of the Bar, etc. to answer complaint to 12-2-75 filed.	(7)
11-26-75	Notice of motion ret 12-5-75 for an order vacating the notice to take deposition of the Business Roundtable filed. (mg)	(8)
11-26-75	Notice of motion ret 12-6-75 for an order quashing the subpoena duces tecum filed. (mg)	(9)
11-26-75	Memorandum of deft Association of the Bar in support of its motion for a protective order filed. (mg)	(10)
11-28-75	Additional supporting affidavit filed. (mg)	(11)
12-2-75	Notice of motion and memorandum of law granting pltff leave to amend complaint to include Business Roundtable as a deft, ret 12-5-75 at 11:30 A.M. filed.	(12/13)
12-4-75	Memorandum in opposition to pltff's motion for leave to file an amended complaint etc filed. (mg) affidavit of Atty General	(14) (14a)
12/5/75	Before PLATT,J.- Case called. Respectfully referred to Ch. J. Kaufman for re-assignment	
1-13-76	Letter dtd 1-9-76 to J. Dooling from Haliburton Fales filed.	(15)
1-13-76	By DOOLING, J. - Memorandum to counsel dtd 1-12-76 filed. (ltr mailedto attys).	(16)
1-16-76	Letter from Haliburton Fales, II dtd 1-16-76 filed.	(17)
1-22-76	Before DOOLING,J.-Case was discussed. White & Case will file a brief in 2 weeks on the question of dismissing the action. The State will file its brief in 4 weeks.	
2-5-76	Deft. memo of law in opposition to pltff. motion for the convening of a three judge court fild.	(18)
2-18-76	Memorandum of Attorney General in opposition ot pltff's motion to convene a three judge court filed.	(19)
2-24-76	Reply memorandum in further support of pltff's motion for the convening of a three judgment court filed.	(20)
3-1-76	Memorandum of deft the Association of the Bar in response to pltff's reply memorandum in further support of motion for 3 judge court filed.	(21)
3-1-76	Before DOOLING,J.- Case called. Argument heard on motion for 3 Judge court. Decision reserved.	
3-25-76	By DOOLING,J.- Memo and order dtd. 3-24-76 that pltff's motion to convene a three judge court is denied filed.	(22)
3-30-76	Copy of letter dtd 3-29-76 to Alvin H. Schulman from pltff filed.	(23)
[illegible]	[illegible]	
4-7-76	Notice of motion ret 4-12-76 for an order granting pltff leave to file an amended complaint etc filed with Memo in support.	(24) (2
4-13-76	Memorandum in opposition to pltff's motion for summary declaratory judgment filed.	(26)
4-14-76	Affidavit of Robert G. Haile Jnr.filed.	(27)
4-16-76	Supplemental affidavit filed.	(28)
4-16-76	Before DOOLING,J.-Arguments for summary judgment presented. Decision reserved.	

Deputy Clerk

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF 75C 1473	DEFENDANT	CKET NO. 75C 1473
PERSON	ASSOCIATION OF THE BAR	OF PAGES

DATE	NR.	PROCEEDINGS
5-7-76		Letter dtd 5-6-76 to J. Dooling from Haliburton Fales, 2d. (29)
5-10-76		Letter dtd. 5-7-76 from Carl Person to Judge Dooling with copy annexed of leteter A. Schulman to Carl Person filed. (30)
5-21-76		Copy of letter dtd 5-17-76 to Alvin H. Schulman from Carl E. Person filed. (31)
6-25-76		By DOOLING,J.- Memo and order granting pltff's motion for a summary declaratory judgment invalidating Disciplinary Rule 7-109(c) and denying pltff's motion for a severance of the above issue filed. (32)
7-6-76		Amended complaint filed. (33)
7-16-76		ANSWER of Association of the Bar to pltff's amended complaint filed. (34)
7-21-76		Answer to amended complaint filed. (35)
7-26-76		Notice of motion ret 8-3-76 for an order granting summary judgment in favor of pltff and against each of the defts on pltff's action for a declaratroy judgment etc filed with affidavit of service. mg (36) (3
7-27-76		Affidavit of D. Cohen in opposition to motion for summary judgment ret/ 8-3-76 filed. (37)
7-28-76		Reply affidavit of C. Person filed. (38)
8-2-76		Affidavit of H. Fales filed. (40)
8-4-76		2nd reply affidavit of C. Person filed. (41)
8-[illegible]-76		By DOOLING,J-Memo & Order dtd 8-10-76 dismissing Counts I and II of the complaint and that Disciplinary Rule 7-109C of the Lawyers' Code of Professional Responsibility as adopted by the New York State Bar Association, and that rule as incorporated in Rule 6-3.2 of the Rules of the Appellate Div., First Dept, and Rule 691.2 of the Rules of Appellant Div. Second Dept, so far as the rule proscribes the payment of reasonable fees for the professional serives of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional, and the Clerk is directed to prepare final judgment for approval of the Court etc filed. p/c (42)
8-12-76		JUDGMENT dtd 8-12-76 that Disciplinary Rule 7-109C of the Lawyers Code of Professional Responsibility, as adopted by the New York State Bar, etc etc re payment of reasonable fees for professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case etc is unconstitutional and that pltff take nothing on counts one and two etc filed (APPROVED) BY DOOLING,J (43)

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DATE	FILINGS – PROCEEDINGS
9-13-76	Filed copies of docket entries and notice of appeal
9-15-76	Daniel M. Cohen file Form C, p/s
9-20-76	Received docket fee
9-20-76	Daniel M. Cohen filed Form C
9-20-76	Daniel M. Cohen filed Form D
9-20-76	Filed scheduling order #1 (CAMP) PC
9-23-76	Filed affidavit of service for Forms C and D, appellant
9-28-76	Filed record (original papers of district court)
10-19-76	Filed motion for an extension of time to file brief and appendix appellant, p/s
10-20-76	Filed scheduling order #2 (CAMP)

Amended Complaint (Jury Demand)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 3

CARL E. PIERSON,	:	75 C 1473 (JFD)
Plaintiff,	:	
-against-	:	AMENDED COMPLAINT
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	(Jury Demand)
Defendants.	:	

Plaintiff, acting pro se, as and for his amended complaint, respectfully alleges:

COUNT 1

(Conspiracy to Restrain Trade)

Jurisdiction

1. The jurisdiction of this court to hear count 1 of this complaint, against defendant THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, is based upon the original jurisdiction of this court to hear "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies", and, as hereinafter set forth, this controversy involves § 1 of the Sherman Antitrust Act (15 U.S.C. § 1); §§ 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15 and 26); and § 1337 of the Judicial Code (28 U.S.C. § 1337).

Venue

2. The defendant THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK is found, has an agent or transacts business in the Eastern District of New York. Venue is provided by § 4 of the Clayton Antitrust Act (15 U.S.C. § 15).

Plaintiff

3. Plaintiff, Carl E. Person, resided at 66-19 52nd Avenue, Queens, New York 11378 at the commencement of this action, and now resides at 329 E. 63rd Street, New York, New York 10021, and has his office for practice of law at 132 Nassau Street, New York, New York 10038.

Defendants

4. The Association of the Bar of the City of New York (a defendant in all counts of this amended complaint) has its principal place of business at 42 West 44th Street, New York, New York 10036. Defendant was founded in 1870.

5. The Supreme Court, Appellate Division, First Department, of the State of New York (a defendant in counts 2 and 3 of this amended complaint), consisting of 7 Justices of the Supreme Court, has its principal place of business at Madison Avenue and 25th Street, New York, New York 10010.

6. The Supreme Court, Appellate Division, Second Department, of the State of New York (a defendant in counts 2 and 3 of this amended complaint), consisting of 7 Justices of the Supreme Court, has its principal place of business at Monroe Place, Brooklyn, New York 11201.

7. The Attorney General of New York State (a defendant in counts 2 and 3 of this amended complaint) has his principal place of business at No. 2 World Trade Center, New York, New York 10047.

8. Each of the defendants described in ¶¶ 5-7 above is sued in an individual capacity and not as a governmental official or body.

Co-Conspirators

9A. Various persons (including bar associations, courts and attorneys who are not made defendants in this action or this count 1) participated as co-conspirators in the illegal activities charged herein and performed acts or made statements in furtherance thereof. These persons (hereinafter, the "Co-Conspirators") include:

(a) American Bar Association (founded in 1878);

(b) The New York State Bar Association (founded in 1876);

(c) Appellate Divisions of the Supreme Court of New York State for the First, Second, Third and Fourth Departments;

(d) Court of Appeals of New York State;

(e) Other bar associations and courts in New York State or throughout the United States which have adopted or are enforcing laws or rules which prohibit clients pursuing antitrust claims and/or their attorneys working on a contingent-fee basis from obtaining the money to pay the litigation expenses by selling a percentage of their respective interests in the antitrust claims to private or public investors and from employing expert witnesses to testify at the trial on a contingent-fee basis;

(f) Attorneys in the Eastern or Southern Districts of New York, elsewhere in New York State or elsewhere in the United States, including members of bar associations, who have participated in the adoption or enforcement of laws or rules which prohibit the activities described in subparagraph (e) above; and

(g) Clients of any of the attorneys described in the preceding subparagraph (f) who give encouragement to the attorneys in their efforts to prevent the activities described in subparagraph (e) above for the purpose of making it more difficult if not impossible for small businesses to enforce any of their antitrust claims against any of these clients.

9B. Plaintiff is the attorney for each of the 10 plaintiffs in an antitrust action entitled National Auto Brokers Corp. v. General Motors Corporation (the "Nabcor Action"), commenced during 1970 in the United States District Court for the Southern District of New York under Index No. 70 Civ. 5421. The plaintiffs in the Nabcor Action are National Auto Brokers Corp., a Pennsylvania corporation ("Nabcor"), Nabcor's two founders (Frank and Anthony Maiorana) and 7 Nabcor franchisees (hereinafter collectively referred to as the "Nabcor Plaintiffs").

9C. There are 29 defendants in the Nabcor Action, including General Motors Corporation ("GM"), General Motors Acceptance Corporation ("GMAC"), Ford Motor Company, Chrysler Corporation, American Motors Corporation, First National City Bank and 23 other defendants, consisting of one or more franchised new-car dealers, automobile dealer associations, banks, Better Business Bureaus and newspapers (hereinafter collectively referred to as the "Nabcor Defendants").

9D. The Nabcor Plaintiffs in the Nabcor Action seek in the aggregate $300,000,000 (after trebling) for damages which they allege were sustained by them as a result of conspiratorial activities of the Nabcor Defendants which allegedly drove Nabcor and its 250 Nabcor franchisees out of the unique business of selling new cars to the public at substantial discounts in price. These conspiratorial activities are alleged in the Nabcor Action to include:

(a) Interference by GM and Ford with the business relationships of the Nabcor Plaintiffs with numerous franchisees of GM and Ford who were willing to supply new cars to the Nabcor Plaintiffs on a "fleet" or wholesale basis;

(b) Refusals by banks and other financial institutions to provide "indirect" (customer) financing for the benefit of prospective new-car customers of the Nabcor Plaintiffs unless the customers purchased the new cars from automobile dealers franchised by the automobile manufacturers;

(c) Issuance by the Better Business Bureaus of unprivileged, libelous reports on Nabcor and its franchisees to potential customers of Nabcor and its franchisees and to numerous major daily newspapers in which Nabcor and its franchisees sought to advertise new cars and/or franchises;

(d) Refusals by major daily newspapers in numerous cities throughout the United States to accept any additional new-car or franchise advertising from Nabcor or its franchisees;

(e) Pressure by associations of franchised new-car dealers and their members on the automobile manufacturers, banks, other financial institutions, newspapers, franchised automobile dealers who were supplying new cars to Nabcor and its franchisees and governmental agencies, to have them refuse to deal with Nabcor and its franchisees or otherwise unlawfully interfere with their unique system for marketing new cars to the public at discount prices; and

(f) Higher charges to Nabcor and its franchisees for the new cars they bought from franchised dealers than the charges paid by leasing companies to the same dealers, even though Nabcor and its franchisees were competing with the leasing companies in the resale of new cars.

9E. Two federal grand juries (Eastern District of New York and Western District of New York) were convened by the United States Justice Department to investigate charges by Nabcor and some of its franchisees, but no indictments were handed down. Nabcor's officials were not called to testify at either grand jury proceeding, and one of the federal officials working on Nabcor's complaints was hired by GM.

10. After commencement of the Nabcor Action, GM's attorneys are alleged to have solicited various persons to bring civil and/or criminal proceedings against Nabcor and/or its two founders.

11. Officials or employees of GM and GMAC are alleged to have had meetings and other communications with persons who removed all of Nabcor's records under gunpoint, which meetings and other communications took place before and after the gunpoint incident, and resulted in having GM or GMAC extend financing to such persons after the gunpoint event. GM and GMAC knew that the persons were willing to terminate the Nabcor Action if they were able to take control of Nabcor as a result of their removal of the Nabcor records. Plaintiff, Nabcor and its two founders caused the arrest of the 7 persons who participated in the robbery of Nabcor's records.

12. Neither Nabcor, a public company, nor any of the other Nabcor Plaintiffs have any present ability to pay the substantial litigation expenses needed by the Nabcor Plaintiffs to obtain a fair and speedy trial. As a result, the trial in the Nabcor Action (set for later in 1975 or early in 1976, as of the filing of the original complaint herein, and for September 27, 1976, as of the date of this amended complaint) may not result in substantial justice for the Nabcor Plaintiffs. Nabcor's past inability to pay for necessary litigation expenses in the Nabcor Action resulted in a substantial reduction in plaintiff's and the Nabcor Plaintiffs' ability to prosecute the Nabcor Action (especially in comparison to activities of the Nabcor Defendants in defense of the Nabcor Action), and such financial disability of the Nabcor Plaintiffs has had a noticeable and substantial adverse impact on the Nabcor Plaintiffs' ability to obtain a fair and speedy trial and just resolution of the issues, from commencement of the Nabcor Action in 1970 to the present. Such adverse impact cannot be wholly overcome even if all of the financing sought by plaintiff and the Nabcor Plaintiffs is obtained.

13. Plaintiff and the Nabcor Plaintiffs seek to offer and sell about 20% of their respective interests in the $300,000,000 antitrust claim (after

trebling) to raise the money needed by the Nabcor Plaintiffs to pay the substantial out-of-pocket expenses to be incurred to bring the Nabcor Action to a conclusion (including any appeals). None of the proceeds of the financing would be used to pay any legal fees to plaintiff.

14. Plaintiff, on behalf of the Nabcor Plaintiffs, recently commenced preliminary discussions with the President of Public Equity Corporation, of Larchmont, New York, to obtain the needed financing, pursuant to which Public Equity Corporation would be given a percentage of the entire antitrust claim (including a percentage of plaintiff's contingent-fee interest in the claims). Public Equity Corporation has indicated a willingness to provide the financing, although no agreement has been made.

15. On or about July 1, 1975, Public Equity Corporation, a business corporation for profit, received approval from the Securities and Exchange Commission to make a registered public offering of 480,000 shares of common stock to raise up to $2,400,000 from the public to finance "public-interest" litigation (among other activities relating to litigation), including antitrust litigation such as the Nabcor Action. In its prospectus, Public Equity Corporation warns prospective investors that existing rules, regulations and statutes raise serious doubts about the legality of such financing under such rules, regulations and statutes. Specifically, under existing New York law and bar association Disciplinary Rules, Public Equity Corporation and plaintiff could be charged with champerty, maintenance and (as to Public Equity Corporation) the unauthorized practice of law; also, plaintiff could be charged with splitting fees with a layman; other charges are also possible.

16. In the event a financing by Public Equity Corporation does not work out, plaintiff and the Nabcor Plaintiffs plan to seek other investors, by private or public offering, to provide financing for the Nabcor Action.

17. All of the proceeds of any such financing(s) would be used to finance the out-of-pocket expenses of the Nabcor Action, and none of the proceeds would be used to pay any legal fees to plaintiff. Some of the proceeds may be used to pay legal fees to attorneys having no affiliation with plaintiff.

18. Disciplinary Rules of defendant The Association of the Bar of the City of New York, rules of each of the four Appellate Divisions of the Supreme Court of the State of New York, and various provisions of the New York Judiciary Law prohibit or seem to prohibit the contemplated litigation financing, with a combined threat of disbarment, suspension, censure, injunction, criminal fines and jail sentences and investigations. See ¶¶ 45-B and 49 for the identification of each such rule and statutory provision.

19. Nabcor, its two founders and the other Nabcor Plaintiffs are in dire financial condition, which condition has resulted, allegedly, from the illegal activities of GM, GMAC, Ford and the other Nabcor Defendants, as described in the complaint in the Nabcor Action. Pursuant to its actual or implied obligations to its franchisees, Nabcor agreed to pay for the litigation expenses of the Nabcor franchisees who are plaintiffs in the Nabcor Action.

20. Nabcor and the other Nabcor Plaintiffs are unable to pay or borrow the substantial litigation expenses needed to bring the Nabcor Action to a speedy and just conclusion. As a result, plaintiff has been obliged over the past 5 years (before commencement of this action) to perform a substantially greater amount of paralegal services, on a contingent-fee basis, than would otherwise have been required of plaintiff, such as the transcription of depositions taken by tape recording machines pursuant to court order, and the typing and proofreading of documents which are listed in about 37 pages of docket sheets

In substantial excess of $200,000 in paralegal services have been advanced by or at the expense of plaintiff which was necessitated by the financial inability of the Nabcor Plaintiffs to properly finance their action.

21. In the Nabcor Action, GM appears to be paying most of the litigation expenses, directly or indirectly, for the benefit of all the Nabcor Defendants. GM has noticed and paid for substantially all of the depositions taken by any of the Nabcor Defendants during the 5 years of litigation. Most of the other discovery has been initiated and paid for by GM and its counsel, all for the benefit of the other Nabcor Defendants. The court has permitted this arrangement of litigation financing among the Nabcor Defendants.

22. GM or any of the other Nabcor Defendants is able to borrow money to pay for their expenses in defending the Nabcor Action, which would include the issuance of a promissory note or other security to the lenders (i.e., investors) without fear of any of the sanctions described in ¶ 18 above.

23. Plaintiff is employed as attorney for the Nabcor Plaintiffs on a 35% contingent-fee basis and would receive no part of the contemplated financing as a legal fee; some of the financing would be used to reimburse plaintiff for litigation expenses which have not yet been reimbursed.

24. The Nabcor Action was brought to establish the right of non-franchised (independent) new-car dealers or "automobile brokers" to sell new cars to the consuming public at substantial discount prices, in competition

with factory-franchised and factory-owned new-car dealerships, with savings to the consuming public ranging from about $200 to $1,000 per new car, in most instances.

25. Attorneys for GM and GMAC have advised the court that if the Nabcor Plaintiffs obtain the injunctive relief they seek, there would result a major change in the method of marketing new cars by the entire automobile industry in the United States. In essence, GM's attorneys are claiming that if the Nabcor Plaintiffs win the Nabcor Action, the franchised distribution system of the automobile manufacturers would be unable to withstand the competition of independent new-car dealers such as Nabcor and its franchisees, and new-car prices would drop substantially from the monopolistic level they now are at.

26. The Nabcor Plaintiffs have established that there are a substantial number of triable issues of fact, and the 2-3 months' trial, as of the filing of the original complaint, was scheduled to commence in late 1975 or early 1976, and as of the date of this amended complaint the first of four separate trials is scheduled to commence September 27, 1976.

27. The Nabcor Plaintiffs are unable to obtain adequate expert testimony in the fields of accounting, franchising, finances and economics because of their poor financial condition (caused by the Nabcor Defendants) and because of Disciplinary Rule 7-109(c) of defendant The Association of the Bar of the City of New York which prohibits plaintiff from using any expert witnesses (such as certified public accountants or economists knowledgeable about the automobile business) who are to be paid on a contingent-fee basis (percentage of claim and/or fixed amount). Under the Disciplinary Rules, GM and the other Nabcor Defendants are permitted to use (and actually have used

and plan to use) expert witnesses drawn from accounting firms which have enjoyed substantial profits from prior GM* business and can be expected to enjoy substantial profits from GM* business to be received and performed after the trial in the Nabcor Action, unless their testimony fails to live up to the expectations of GM.* This arrangement has a contingent interest far more substantial than the type of contingent arrangement sought by plaintiff, in which expert witnesses called by the Nabcor Plaintiffs would receive from their contingent interest (fixed amount and/or percentage) an amount of money far less in amount than the future profits from GM* which GM's* expert witnesses stand to lose. This Disciplinary Rule of defendant bar association is no more than a discriminatory rule which prohibits a poor litigant from maintaining an action under the pretext of "conflict of interest" but allows wealthy litigants to use expert witnesses who have an even greater conflict of interest. Nabcor needs at least $200,000 in services by persons who will testify as experts

28. Plaintiff also represents (on a contingent-fee basis) John G. O'Keeffe, the plaintiff in an action entitled O'Keeffe v. The Union Central Life Insurance Company, an antitrust action commenced during 1975 in the United States District Court for the Eastern District of New York under Index No. 75 C 548 (GCP).

29. Plaintiff and Mr. O'Keeffe seek to obtain financing to cover the substantial out-of-pocket litigation expenses by selling a percentage of Mr. O'Keeffe's $2,250,000 antitrust claim for damages (after trebling).

30. Plaintiff is the attorney for other persons who have antitrust claims now in litigation, and plaintiff seeks to arrange for expense financing for some or all of these antitrust actions (as well for any future clients with antitrust claims) with the prior consent of each of the clients.

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* Or other Nabcor Defendants with whom they do business.

31. In no case is it contemplated by plaintiff or his clients that any person or persons providing such financing would

(a) have any right to control any part of the antitrust litigation;

(b) obtain any interest in any claim other than the antitrust claim;

(c) render any legal advice;

(d) engage in any unauthorized practice of law (although this point needs to be clarified under existing rules and statutes); or

(e) obtain, in the aggregate, 50% or more in interest in the antitrust claims in litigation.

It is expected, however, that the person or persons providing financing would render services of a paralegal nature in the Naboor Action from time to time.

Trade and Commerce Involved

32. Plaintiff was admitted to the practice of law in the State of New York during 1962, and has practiced law in New York City continuously from 1962 to the present. From 1969 to the present, plaintiff has had at least 6 clients for plaintiff's legal services, in the area of antitrust law, who either resided or had its principal place of business outside of the State of New York. The quantum meruit value of plaintiff's legal services to these non-New York clients has exceeded $2,000,000 (performed by plaintiff on a "contingent-fee" basis, for the most part). Most of the allegedly illegal activities of other persons for which these clients are using plaintiff as their attorney to obtain recovery of damages under the federal antitrust laws (in the federal courts in the Eastern and Southern Districts of New York and the Eastern District of Pennsylvania) occurred outside of the State of New York. Damages to plaintiff's clients are alleged in such actions to have exceeded $100,000,000 in the aggregate (before trebling). Plaintiff, in connection with such litigation, has travelled to various states during the past 5 years, including Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, New

Jersey, Pennsylvania, Virginia and to the District of Columbia, involving out-of-pocket expenses (incurred on behalf of the clients) in excess of $10,000.

33. The Co-Conspirator attorneys and their respective law firms in the Eastern and Southern Districts of New York which dominate the defendant The Association of the Bar of the City of New York and Co-Conspirator bar associations (and are responsible for the adoption or enforcement of the laws and rules which prohibit the financing of a plaintiff's antitrust claims (as summarized in ¶ 9A-e above) receive in the aggregate hundreds of millions or one or more billions of dollars each year in legal fees for their legal representation of most of the 500 largest and other major corporations in the United States. A substantial part of this legal representation involves matters in or relating to interstate commerce, such as representation in antitrust, securities, commercial banking and FTC matters.

National Policy

34. It is the policy of this nation to encourage private enforcement of the nation's antitrust laws, to assist the Justice Department, Federal Trade Commission and other federal agencies in enforcing such laws.

35. The federal agencies responsible for enforcement of the nation's antitrust laws have been inadequately financed from their inception to the present to achieve substantial enforcement of the antitrust laws, and they have not in fact achieved substantial enforcement from inception to the present.

36. Private antitrust claimants and their attorneys are considered to be "private attorneys general" for the enforcement of the nation's antitrust

laws; however, no federal financing is available to assist these private attorneys general in the performance of their quasi-public duties.

37. Most businesses and consumers are suffering damages as a result of antitrust law violations. For example, approximately 8-10,000,000 persons each year pay overcharges on new-car purchases amounting to $200 to $1,000 on each new-car purchase, in most instances. The Nabcor Action was brought to correct this situation.

38. Virtually all of the businesses and consumers suffering such damages from antitrust law violations cannot afford to enforce their rights under the antitrust laws and, as a result, they are prevented from obtaining justice. These same persons have been paying taxes for the governmental enforcement of such laws, but have seen very little in results. These same people are to be solicited by plaintiff and his clients for the financing needed to enforce the antitrust laws, in the event the substantial legal problems are resolved satisfactorily by this court.

39. Because of the financial inability of private persons to enforce the nation's antitrust laws, various public evils have developed, including the following:

(a) Competition has decreased substantially in most industries, together with opportunities for persons without substantial amounts of capital;

(b) Monopolies have been permitted to form and grow radically in size and importance in our economy;

(c) Consumers have been overcharged many billions of dollars in the form of higher prices and lower quality of goods and services, which has resulted in needless inflation and the development of "consumerism" which tends to limit opportunities for small businesses to an even further extent; higher prices for oil and oil products have resulted as well;

(d) The free-enterprise system has come to a virtual halt, which becomes a substantial threat to the existing political system in the United States;

(e) Small businesses and their owners have lost many billions of dollars in profits to the monopolies, which has resulted in an illegal, upward redistribution of wealth, unrelated to acceptable competitive factors;

(f) Only the rich have the financial capacity to enforce the antitrust laws, and they are the very persons who are least apt to do so; and

(g) Persons injured by persons violating the nation's antitrust laws are deprived of their (i) right to petition the court for a redress of their grievances; (ii) right to a fair and speedy trial; and (iii) right to alienate or sell the property interest they possess in the antitrust claims they possess in lieu of a profitable business, even though the claims are assignable under law.

40. The federal, state and city governmental agencies empowered to enforce the nation's and state's antitrust laws do not have sufficient resources to prosecute all apparent substantial violations of these laws, because of insufficient funding and because of other political considerations (such as not wishing to deter major corporations or their officials from making substantial campaign contributions).

41. The amount of money available to governmental agencies to prosecute alleged antitrust violators (criminally or civilly) is a very small fraction of the amount available to the alleged violators to defend themselves. The amount spent in the defense of a single alleged violator has exceeded the amount available to the Justice Department to enforce all of the nation's antitrust laws against all violators thereof for a whole year. Much less than this is available to state and local governmental agencies, resulting in virtually non-existent enforcement programs.

42. The present degree of enforcement of the nation's and states' antitrust laws is so minimal that governmental enforcement of such laws could be abolished and all enforcement activities carried out by private attorneys general, with or without federal funding, without any substantial adverse impact on the present status of the economy.

43. The public financing of antitrust actions would result in a substantially greater level of enforcement of the nation's antitrust laws than the present level of enforcement by governmental officials, and such private actions would be of substantial assistance to the governmental officials by helping them identify antitrust violations and obtain evidence, all at no cost to the government enforcers.

Combination or Conspiracy in Restraint of Trade

44. Plaintiff alleges that beginning in 1908 and continuing up to and including the date of this amended complaint, defendant The Association of the Bar of the City of New York and the Co-Conspirators have and now are engaged in a continuing unlawful combination or conspiracy unreasonably to restrain or monopolize trade and commerce (i) in the rendering and financing of legal and paralegal services for persons with antitrust claims or litigation arising under the nation's antitrust laws; and (ii) in other industries involving high concentrations of economic power through the scheme of making legal and paralegal services unavailable to smaller businesses and new entrants in the industries, in violation of § 1 of the Sherman Antitrust Act (15 U.S.C. § 1).

45. As part of said unlawful combination or conspiracy and in order to accomplish the purposes thereof, defendant The Association of the Bar of the City of New York and one or more of the Co-Conspirators performed or caused performance of the following acts:

A. Upon information and belief, defendant The Association of the Bar of the City of New York participated in the adoption, during 1908, by the American Bar Association ("ABA") of the original 32 Canons of Professional Ethics, which were subsequently amended by the addition of Canons 33-47. Canons 13, 34, 42 and 47 prohibited an attorney and his client from selling part of the clients' antitrust claims and attorneys' contingent-fee to raise money to pay for expenses of the antitrust action.

B. The 47 Canons are the predecessor to the Code of Professional Responsibility (the "ABA Code") adopted by the ABA House of Delegates on August 12, 1969 to become effective for ABA members on January 1, 1970. Part of the ABA Code consists of a series of Disciplinary Rules ("DR's"), including the following about which plaintiff complains herein:

2-103(D)
2-106(A)
2-107(A)
3-101(A)
3-102
3-103
5-103(B)
5-107(C)
7-109(C).

The foregoing Disciplinary Rules prohibit or could be construed to prohibit the antitrust litigation financing which plaintiff and his clients seek to obtain, and prohibit the use of expert witnesses on a contingent-fee basis.

C. Defendant The Association of the Bar of the City of New York participated in many of the meetings with the ABA and other Co-Conspirators pursuant to which the ABA Code was discussed in draft form, including some or all of the Disciplinary Rules listed in subparagraph B above.

D. Acting through its Co-Conspirator members and possibly other Co-Conspirators, Co-Conspirator The New York State Bar Association adopted the 47 Canons in 1909 and the ABA Code effective January 1, 1970, including the

Disciplinary Rules listed in subparagraph B above.

E. Acting through its Co-Conspirator members and possibly other Co-Conspirators, defendant The Association of the Bar of the City of New York adopted the 32-47 Canons of the ABA during or after 1909, and the ABA Code, subject to reservations not relevant to this action, sometime during 1969-71, including the Disciplinary Rules listed in subparagraph B above.

F. Upon information and belief, defendant The Association of the Bar of the City of New York, through its Committee on Grievances and Executive Committee, has continually enforced each of the Canons and Disciplinary Rules as to attorneys practicing in New York City, through numerous disciplinary proceedings, some of which were commenced in the Appellate Division of the First or Second Department of the Appellate Division of the Supreme Court of the State of New York, and through the ever-present threat of prosecution.

G. Defendant The Association of the Bar of the City of New York obtains compensation from the Office of Court Administration of New York State to reimburse the bar association for its costs incurred in running its Grievance Committee.

H. Upon information and belief, the Appellate Divisions of the New York Supreme Court for the First and Second Departments have consistently upheld the Canons and Disciplinary Rules, and as a result all attorneys in the Eastern and Southern Districts of New York are threatened with disbarment, suspension or censure if they should violate any of the Disciplinary Rules.

46. Plaintiff and his clients have suffered damages amounting to many millions of dollars, at a minimum, as a result of the conspiratorial adoption of the Disciplinary Rules which prohibit the contemplated financing of antitrust litigation and use of expert witnesses on a contingent-fee basis in such antitrust litigation. Plaintiff seeks in damages the minimum amount needed to qualify for a trial by jury, but plaintiff waives any other damages and any award for legal fees.

COUNT 2

(Denial of Civil Rights)

Jurisdiction

47. The jurisdiction of this court to hear count 2 of this amended complaint, against defendants, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT and ATTORNEY GENERAL OF NEW YORK STATE, is based upon the original jurisdiction of this court under § 1343 of the Judicial Code (28 U.S.C. § 1343) to hear an action to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage" of the State of New York "of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States". Specifically, count 2 of this amended complaint is brought to redress the deprivation of rights, privileges and immunities secured to plaintiff by the:

(a) Interstate Commerce Clause, Art. 1, § 8 of the U.S. Constitution;

(b) Guarantee of a Republican Form of Government, Art. 6, § 4 of the U.S. Constitution;

(c) 1st Amendment to the U.S. Constitution - Right to Petition the Government for a Redress of Grievances, made applicable to the States by the 14th Amendment;

(d) 14th Amendment to the U.S. Constitution, § 1 -

Abridgement of Privileges or Immunities;
Deprivation of Property without Due Process of Law, both procedural and substantive; includes improper delegation of legislative power and illegal restraint upon right of alienation;
Denial of Equal Protection of Laws; and

(e) § 1983 of the Civil Rights Act (42 U.S.C. § 1983), providing equal rights under state and local law for citizens or other persons within the jurisdiction of the United States.

48. Plaintiff repeats and realleges each of the allegations contained in ¶¶ 1-46 above, and further alleges that defendant The Association of the Bar of the City of New York's activities in enforcing the Disciplinary Rules, court rules and provisions of the New York Judiciary Law listed in ¶ 49 below, which prohibit plaintiff and his client from obtaining financing for antitrust litigation and use of expert witnesses on a contingent-fee basis, constitute "state action" in violation of § 1983 of the Civil Rights Act (42 U.S.C. § 1983) by unduly limiting plaintiff's and plaintiff's clients' constitutional rights (identified in ¶ 47 above), and by depriving them of their right to act as a private attorney general to enforce the nation's antitrust laws.

49. Plaintiff further alleges that the following provisions of the New York Judiciary Law and Rules of the four Appellate Divisions of the Supreme Court of the State of New York prohibit or appear to prohibit plaintiff and his clients from obtaining the antitrust litigation financing they seek, and prohibit them from using expert witnesses on a contingent-fee basis:

Provisions of New York Judiciary Law:

§ 90(2)
§ 476-a
§ 476-b
§ 476-c
§ 478
§ 479
§ 485
§ 488
§ 489
§ 491
§ 495
§ 750(B).

Rules of the Four Appellate Divisions of the Supreme Court:

First Department: § 603.2, § 603.6 and § 603.18

Second Department: § 691.2 and § 691.15

Third Department: § 800.28

Fourth Department: § 1022.17 and § 1022.20.

50. Plaintiff further alleges that defendants Supreme Court, Appellate Division, First Department and Supreme Court, Appellate Division, Second Department are acting illegally and in violation of § 1983 of the Civil Rights Act (42 U.S.C. § 1983) by their enforcement of the Disciplinary Rules, court rules and provisions of the New York Judiciary Law listed in ¶¶ 45-B and 49 above.

51. Defendant Attorney General of New York State is acting illegally and in violation of § 1983 of the Civil Rights Act (42 U.S.C. § 1983) by his enforcement of the provisions of the New York Judiciary Law listed in ¶ 49 above.

52. Plaintiff and his clients have suffered damages amounting to many millions of dollars, at a minimum, as a result of the illegal enforcement

of the Disciplinary Rules, court rules and provisions of the New York Judiciary Law by each of the defendants herein, which has prevented plaintiff and his clients from obtaining financing for antitrust litigation and from using expert witnesses on a contingent-fee basis. Plaintiff seeks no damages as to this count 2 or award for legal fees.

COUNT 3

(Action for a Declaratory Judgment)

Jurisdiction

53. Plaintiff repeats and realleges ¶ 47 of this amended complaint as the basis for jurisdiction of this court to hear count 3 of this amended complaint.

54. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

55. Plaintiff repeats and realleges each of the allegations contained in ¶¶ 1-46 and 48-52 above.

PRAYER

WHEREFORE, plaintiff prays:

1. That the herein alleged conspiracy or combination in restraint of trade among defendant The Association of the Bar of the City of New York and Co-Conspirators be adjudged and decreed to be in violation of § 1 of the Sherman Antitrust Act (15 U.S.C. § 1).

2. That the activities of defendants The Association of the Bar of the City of New York; Supreme Court, Appellate Division, First Department; Supreme Court, Appellate Division, Second Department; and Attorney General of New York State be adjudged and decreed to be in violation of § 1983 of the Civil Rights Act (42 U.S.C. § 1983).

3. That the Disciplinary Rules, court rules and provisions of the New York Judiciary Law listed in ¶¶ 45-B and 49 above be declared repugnant to the United States Constitution and Amendments thereto, to the extent they purport to prohibit plaintiff and his clients from offering and selling their respective interests in antitrust claims to public or private investors for the purpose of obtaining financing of out-of-pocket expenses for the antitrust litigation and prohibit the use of expert witnesses in such litigation on a contingent-fee basis.

4. That each of the defendants, their respective agents, attorneys, officials and employees and all persons combining with or acting in concert with any of the defendants or under their direction be permanently restrained and enjoined from prohibiting plaintiff and his clients from offering and selling their respective interests in antitrust claims to public or private investors for the purpose of obtaining financing of out-of-pocket expenses for the antitrust litigation or from retaining or using expert witnesses in such litigation on a contingent-fee basis, and from enforcing any Disciplinary Rules, court rules or statutes which purport to prohibit any such activities.

5. That the amount of damages plaintiff has sustained by reason of the unlawful acts of defendant The Association of the Bar of the City of New York as to count 1 of this amended complaint be assessed in an amount equal to the minimum amount required to qualify for a trial by jury, and defendant The Association of the Bar of the City of New York be ordered to pay plaintiff the amount of such damages.

6. That a judgment be granted against each of the defendants under 28 U.S.C. § 2201 declaring that DR 7-109C is discriminatory, invalid and unenforceable.

7. That plaintiff have such other and further relief as this court may deem just and equitable.

Jury Demand

PLEASE TAKE NOTICE that plaintiff DEMANDS A TRIAL BY JURY as to count 1 of this amended complaint, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable by right by a jury.

Dated: New York, New York
July 4, 1976

Carl E. Person

Carl E. Person, pro se

Office & P.O. Address:
132 Nassau Street
New York, New York 10038

Tel. (212) 349-4616

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

CARL E. PERSON,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

CIVIL ACTION NO. 75-C-1473 (ERN)

ANSWER

- x

Defendant, The Association of the Bar of the City of New York by White & Case, its attorneys, for its answer to the complaint, upon information and belief:

1. With respect to paragraph 1 admits that this action purports to be brought pursuant to the statutes referred to in said paragraph.

2. Admits that defendant transacts business in the Eastern District of New York.

3. Admits each allegation of paragraph 3.

4. Admits each allegation of paragraph 4.

5. Admits each allegation of paragraph 5.

6. Admits each allegation of paragraph 6.

7. Admits each allegation of paragraph 7.

8. Admits that plaintiff purports to sue the defendants described in paragraphs 5 through 7 of the complaint in their individual capacities and not as governmental officials or as governmental bodies.

9. Denies each allegation of paragraph 9.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6 (sic) [10].

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 (sic) [11].

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 (sic) [12].

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 (sic) [13].

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 (sic) [14].

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 (sic) [15].

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 (sic) [16].

17. With respect to paragraph 13 (sic) [17] admits that this action is purportedly brought so that plaintiff and the Nabcor plaintiffs may seek to offer and sell 20% of their respective interests in a three hundred million dollar antitrust claim to raise money to pay for out-of-pocket expenses to be incurred to bring the Nabcor action to a conclusion.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 (sic) [18].

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 (sic) [19], except admits that under existing New York law and Bar Association Disciplinary Rules it is possible that Public Equity Corporation and plaintiff could be charged with champerty, maintenance and, as to Public Equity Corporation, the unauthorized practice of law, and that plaintiff could be charged with splitting fees with a layman.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 (sic) [20].

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 (sic) [21].

22. Admits each allegation of paragraph 18 (sic) [22].

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 (sic) [23].

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 (sic) [24].

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 (sic) [25].

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22 (sic) [26].

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27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 23 (sic) [27].

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 24 (sic) [28].

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25 (sic) [29].

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26 (sic) [30].

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 (sic) [31] that Nabcor plaintiffs are unable to obtain adequate expert testimony in the fields of accounting, franchising, finances and economics because of their poor financial condition and that Nabcor needs at least two hundred thousand dollars in services by persons who will testify as experts; admits that Disciplinary Rule 7-109(c) of defendant The Association of the Bar of the City of New York prohibits plaintiff from using any expert witnesses who are to be paid on the contingent-fee basis; and denies all other allegations of this paragraph.

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28 (sic) [32].

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29 (sic) [33].

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30 (sic) [34].

35. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 (sic) [35].

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 (sic) [36], except admits that plaintiff is a member of the New York Bar.

37. Denies each allegation contained in paragraph 33 (sic) [37], except admits that members of the New York Bar, from time to time, represent clients in matters relating to interstate commerce, including representation in antitrust, securities, commercial banking and FTC matters, and that millions of dollars in legal fees in the aggregate are received by members of the bar.

38. Since the allegations of paragraph 34 (sic) [38] state a legal conclusion defendant neither admits nor denies said paragraph.

39. Denies each allegation of paragraph 35 (sic) [39].

40. Since the allegations of paragraph 36 (sic) [40] state a legal conclusion defendant neither admits nor denies said paragraph.

41. Denies each allegation of paragraph 37 (sic) [41], except denies knowledge or information sufficient to form a belief as to the truth of the allegation that the Nabcor Action was brought to correct the situation referred to in said paragraph.

42. Denies each allegation of paragraph 38 (sic) [42].

43. Denies each allegation of paragraph 39 (sic) [43].

44. Denies each allegation of paragraph 40 (sic) [44].

45. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 41 (sic) [45].

46. Denies each allegation of paragraph 42 (sic) [46].

47. Denies each allegation of paragraph 43 (sic) [47].

48. Denies each allegation of paragraph 44 (sic) [48].

49. Denies each allegation of paragraph 45 (sic) [49].

50. Denies each allegation of paragraph 46 (sic) [50], except admits that plaintiff seeks in damages the minimum amount needed to qualify for a trial by jury and that plaintiff waives all other damages and any award for legal fees.

51. Admits that this action purports to be brought pursuant to the statutes referred in said paragraph 47.

52. Defendant repeats and realleges each of its answers to the allegations contained in paragraphs 1 through 46 (sic) [1 through 50] and denies the remaining allegations contained in paragraph 48 (sic) [52].

53. Admits each allegation of paragraph 49 (sic) [53].

54. Denies each allegation of paragraph 50 (sic) [54].

55. Denies each allegation of paragraph 51 (sic) [55].

56. Denies each allegation of paragraph 52 (sic) [56], except admits that plaintiff seeks no damages as to Count 2 or award for legal fees.

AS AND FOR A FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint with costs and such further relief as the court in its discretion may deem proper.

WHITE & CASE

By Halliston Fales
A Member of the Firm
Attorneys for Defendant
14 Wall Street
New York, New York 10005
(212) 732-1040

October 28, 1975

Answer of the Association of the Bar to Plaintiff's Amended Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL E. PERSON,		
Plaintiff,	:	CIVIL ACTION NO.
-against-	:	75 C 1473 (JFD)
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	ANSWER OF ASSOCIATION OF THE BAR TO PLAINTIFF'S AMENDED COMPLAINT
Defendants.	:	

Defendant, Association of the Bar of the City of New York ("Association of the Bar") by White & Case, its attorneys, for its answer to the amended complaint, answers and avers as follows:

1. Answering paragraphs 1 through 52 of the Amended Complaint, including paragraphs 9A through 9E thereof, repeats and realleges each and every answer in paragraphs 1 through 56 of its Answer, dated October 28, 1975, as though fully set forth herein.

2. Answering paragraph 53, admits that plaintiff purports to bring this action pursuant to the statutes referred to in said paragraph, otherwise denies the remaining allegations therein.

3. Answering paragraph 54, admits that plaintiff seeks a declaratory judgment pursuant to the statute referred to in said paragraph, otherwise denies the remaining allegations therein.

4. Answering paragraph 55, repeats and realleges each and every answer in paragraphs 1 through 50 and 52 through 56 of its Answer, dated October 28, 1975, as though fully set forth herein.

AS AND FOR A FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

AS AND FOR A SECOND DEFENSE

The Court lacks subject matter jurisdiction because of the absence of a case or controversy.

WHEREFORE, defendant demands judgment dismissing the amended complaint with costs and such further relief as the Court in its discretion may deem proper.

WHITE & CASE

By _____
A Member of the Firm
Attorneys for Defendant
Association of the Bar
14 Wall Street
New York, New York 10005
(212) 732-1040

July 15, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

CARL E. PERSON,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

----------X

XXXXXXXXX
75 C 1473

ANSWER

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, appearing herein as attorney for the defendants herein, other than The Association of the Bar of the City of New York, answers the complaint herein as follows:

FIRST: Denies each and every allegation of paragraphs 1, 7, 8, 46, 47, 48, 50, 51 and 52 of the complaint.

SECOND: Denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 3, 9, 6 (2nd paragraph so numbered), 7 (2nd paragraph so numbered), 8 (2nd paragraph so numbered), 9 (2nd paragraph so numbered), 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45A, 45C, 45D, 45E, 45F, 45G and 45H of the complaint.

THIRD: Denies the allegations of paragraphs 5, 6 and 49 of the complaint, except refers to the provisions of Article 6 of the Constitution of New York and the pertinent provisions of the Judiciary Law for a more accurate description of the Appellate Division defendants.

FOURTH: Denies the allegations of paragraphs 34, 35, and 36 except refers to the pertinent federal statutes for their exact terms.

FIFTH: Denies the allegations of paragraph 45B except refers to the provisions of the specified Canons and Disciplinary Rules for their exact terms.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, ALLEGES:

SIXTH: The Appellate Division defendants named as bodies in this action do not constitute persons within the meaning of the Civil Rights Act, 42 U.S.C. § 1983.

SEVENTH: The office of the Attorney General as it is named in this action, has been and is, contrary to the allegations of the complaint, affirmatively engaged in the enforcement of state statutes similar to the federal civil rights Act; and, as named herein, is not a "person" within the meaning of the federal Civil Rights Act.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE, ALLEGES:

EIGHTH: This Court lacks jurisdiction over the persons of the aforesaid defendants.

FOR A THIRD, SEPARATE AND COMPLETE DEFENSE, ALLEGES:

NINTH: This Court lacks jurisdiction over the subject matter of this action.

FOR A FOURTH, SEPARATE AND
COMPLETE DEFENSE, ALLEGES:

TENTH: The State of New York, which would be subject to ultimate liability for any of the acts alleged to have been performed by the aforesaid defendants, is immune from suit herein; and this action is violative of the provisions of the Eleventh Amendment to the Constitution of the United States.

FOR A FIFTH, SEPARATE AND
COMPLETE DEFENSE, ALLEGES:

ELEVENTH: The complaint herein fails to state a claim sufficient to constitute a cause of action.

WHEREFORE, the complaint herein should be dismissed, with costs.

Dated: New York, New York
October 27, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Appellate Division, First Department
Appellate Division, Second Department
and Pro Se
Office & P. O. Address
Two World Trade Center
New York, New York 10047
By

DANIEL M. COHEN
Assistant Attorney General
Tel. (212) 488-3446

Answer of Defendants Other Than the Association of the Bar to Plaintiff's Amended Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 39

----------X

CARL E. PERSON,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants.

----------X

ANSWER TO AMENDED COMPLAINT

75 C 1473 (JFO)

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, appearing herein as attorney for the defendants herein, other than The Association of the Bar of the City of New York, answers the amended complaint as follows:

FIRST: Answering paragraphs 1 through 52 of the amended complaint, repeats and realleges each and every answer in paragraphs First through Fifth of their Answer, dated October 27, 1975, as though fully set forth herein.

SECOND: Answering paragraph 53, admits that plaintiff purports to bring this action pursuant to the statutes referred to in said paragraph, otherwise denies the remaining allegations therein.

THIRD: Answering paragraph 54, admits that plaintiff seeks a declaratory judgment pursuant to the statute referred to in said paragraph, otherwise denies the remaining allegations therein.

FOURTH: Answering paragraph 55, repeats and realleges each and every answer in paragraphs 1 through 50 and 52 through 56 of the Associations Answer, dated October 28, 1975, as though fully set forth herein.

AS AND FOR SEPARATE
AND COMPLETE DEFENSE

FIFTH: Repeats and realleges each of the five defenses set forth in their Answer dated October 27, 1975.

WHEREFORE, the amended complaint should be dismissed, with costs.

Dated: New York, New York
July 19, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Appellate Division, 1st Dept.,
Appellate Division, 2nd Dept.,
and Pro Se
Office & P. O. Address
Two World Trade Center
New York, New York 10047
By

Daniel M. Cohen

DANIEL M. COHEN
Assistant Attorney General
Tel. (212) 488-3446

Plaintiff's Affidavit in Support of Motion for Leave to Amend Complaint and Exhibits A Through C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 41

CARL E. PERSON,	:	75 C 1473 (TCP)
Plaintiff,	:	PLAINTIFF'S AFFIDAVIT
-against-	:	
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, SUPREME COURT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Carl E. Person, being duly sworn, deposes and says:

1. I am the plaintiff in this action, am fully familiar with all the facts and all prior proceedings herein, and make this affidavit (i) in opposition to the motions by defendant The Association of the Bar of the City of New York ("Bar Association") to vacate plaintiff's Notice of Deposition, dated November 17, 1975 and by witness Business Roundtable to quash the subpoena duces tecum served by plaintiff on Business Roundtable; and (ii) in support of plaintiff's cross-motion for an order granting leave for plaintiff to amend his complaint to include Business Roundtable as a defendant and to made certain other amendments, as contained in Schedule 1 annexed hereto (consisting of pages 1, 2, 4, 6, 10, 15, 16, 19, 20, 22 and 23 of the complaint, marked to show the proposed amendments).

2. Count 1 of the complaint alleges a "continuing unlawful combination or conspiracy unreasonably to restrain or monopolize trade and commerce (i) in the rendering and financing of legal and paralegal services for persons with antitrust claims or litigation arising under the nation's antitrust laws; and (ii) in other industries involving high concentrations of economic power through the scheme of making legal and paralegal services unavailable to smaller businesses and new entrants in the industries, in violation of § 1 of the Sherman Antitrust Act". (¶ 44, at p. 16.)

3. The complaint alleges that the co-conspirators include "clients of any of the attorneys described in the preceding subparagraph (g) who give encouragement to the attorneys in their efforts to prevent the activities described in subparagraph (e) above for the purpose of making it more difficult if not impossible for small businesses to enforce any of their antitrust claims against any of these clients". (¶ 9-g, at p. 3.)

4. Witness Business Roundtable is an organization with a membership of 158 major corporations (see clipping from page 1 of The New York Times of November 16, 1975, a copy of which is annexed hereto as Exhibit A). A list of the members of Business Roundtable and the members of its "Policy Committee" is set forth as Exhibit B hereto (consisting of pages 613-617 of Part 2- Appendix for the Hearings before the Subcommittee on Antitrust and Monopoly, 94th Congress, 1st Session, May-June, 1975).

5. In count 2 of my complaint, I seek to have this court declare unconstitutional various provisions of the New York Judiciary Law, New York court rules and disciplinary rules of defendant Bar Association, to the extent they purport to prohibit my clients and me from offering and selling our

respective interests in the clients' antitrust claims to public or private investors to obtain financing of out-of-pocket expenses for the antitrust litigation. Also, I claim that the disciplinary rule prohibiting use of expert witnesses in such litigation on a contingent-fee basis is unconstitutional. The constitutional arguments are made in the accompanying memorandum of law.

Concentration of Wealth

6. The concentration of wealth in this country is steadily increasing, and is already at a dangerously high level. Senator Philip A. Hart, Chairman of the Senate Subcommittee on Antitrust and Monopoly (and an expert in economics, politics and government) states that:

> "simplification is necessary if we are to deal effectively with our pressing problems, whether they be inflation, collective frustration or the balance of payments. For a common aspect to all of these problems is the impact of monopoly, economic concentration and competition and the degree to which they exist in today's America.
>
> "What we are talking about is the price we pay for everything from homes to safety pins; the quality of products and service for everything from TV sets to auto repairs; the frustrations we face in dealing with an impenetrable 'establishment.' And if, as I believe, a direct correlation exists between economic and political power, we are talking about the very existence and control of our democratic institutions.
>
> "* * * ...(T)here ... (must be) public understanding of the role that antitrust policy — designed to control monopoly and concentration and to insure competition — must play if we are to have any success in dealing with these critical issues. In the past few decades the complexity has made public understanding difficult.
>
> "* * * Antitrust developed as a peculiarly American response to such power, in particular, the obvious and flagrant abuses of economic power which occurred in the late 1800's.
>
> "* * * (T)oday monopoly and its related effects are more complex and refined; they are more subtle and difficult to discern. They are also more dangerous and far-reaching. Unfortunately as the Populist movement lost its vigor, a void developed and the nation became lethargic and unconcerned about the 'new monopoly' and the 'new monopolist.'
>
> "However, in the past few years different — although quieter — voices have been questioning the impact of such concentration on a democratic and free enterprise society. They are alarmed

at the rapid momentum responsible for concentration of our national assets in a few hands --a handful answerable only to themselves. They are distressed at venerable liberal statesmen popularizing the view that new technology makes economic concentration inevitable in the face of the clear evidence that it should be taking us down the road to more competition and less concentration.

"* * * (These are) ... our most vital national problems." (Preface to A Primer on Monopoly and Competition, by Willard F. Mueller (New York: Random House, 1970)

7. I have economists and political scientists willing to testify as expert witnesses in this action that economic concentration is so great that our republican form of government in the states is materially threatened by the resulting transfer of governmental power to the largest corporations.

8. The May, 1975 edition of Fortune Magazine reports that the "Fortune 500" companies (the 500 "largest" industrial companies) have a net worth of $309,507,418,000 ($309 billion) and aggregate annual net income of $44 billion. Approximately 50% of this net worth ($146 billion) is owned by the 113 industrial companies from the "Fortune 500" which are members of the Business Roundtable. This is inheard of economic concentration. (The remaining 45 members of the 158-member Business Roundtable are non-industrials, such as utilities.)

9. The free-enterprise system has been giving way to increased concentration (and abuse) of wealth and the means of production. Opportunities for raising capital to finance new businesses have also declined, together with the opportunities for persons without capital to participate in the "free-enterprise" system. The flow of capital into new businesses in competition with he flow of capital into established businesses is regulated to a considerable extent through the National Association of Securities Dealers, Inc., which is a quasi-governmental organization dominated by investment

agents or representatives of the major corporations in this country. Personnel of the Securities and Exchange Commission fail to give small businesses an equal opportunity to obtain capital in competition with major corporations, and such SEC personnel (who often seek employment with major corporations or law firms representing major corporations) tend to apply the securities acts in favor of the major corporations, at the expense and to the detriment of smaller companies.

10. The economic phenomenon now extant — of substantial increases in prices during a period of substantial decreases in demand for products and services — results to a great extent from monopolistic forces in violation of various antitrust laws. These violations are beyond the capacity of the appropriate government officials to correct, because of the power of the major corporations resulting from their ownership of a large percentage of the nation's business assets.

Plaintiff's Problems

11. I have spent the past 5-1/2 years in major antitrust litigation (the Nabcor Action) on behalf of persons who, in my own professional opinion, were substantially injured as a direct result of substantial and repeated violations of the antitrust laws. My experience has proven to me that without outside financing, the plaintiffs in such antitrust actions have little or no overall impact as a deterrent to antitrust violators, and such plaintiffs are prevented by the lack of money (caused by the violations) from obtaining any meaningful recovery. Any recovery would be too small and too late to give any meaningful redress. Accordingly, by stifling antitrust plaintiffs through expensive litigation which they cannot afford, because of the violations, the national policy of private antitrust law enforcement is

virtually meaningless. This action has been brought by me to make private enforcement of the antitrust laws more effective, by giving private antitrust plaintiffs an opportunity to obtain capital on a competitive basis to enforce their alleged antitrust claims. Through my antitrust litigation (such as in the Nabcor Action and this action) I consider that I am expressing myself politically on issues of the utmost concern to the nation, and as such that I am entitled to the First Amendment freedoms associated with political activity.

12. The lack of sufficient funds to pursue the Nabcor Action has resulted in many problems for plaintiff and his clients, such as requiring the disbanding of the Nabcor discount car business, thereby preventing Nabcor from keeping key witnesses in continued assembly. Instead, most of the witnesses have left Nabcor (except the founders) and some of them have taken positions with franchisees of General Motors or Ford and, accordingly, are not interested in testifying. The lack of funds has also prevented Nabcor from keeping its records together, thereby preventing Nabcor from proving the full extent of its damages. Through non-payment of rent and insufficient funds to preserve or ransome vast quantities of records, Nabcor had to part with control of material financial and other records. Also, Nabcor has insufficient funds to hire needed expert witnesses (including accounting firms, economists and franchise experts) or to pay the expenses for witnesses to come to trial to testify. Nabcor would not be able to pay an estimated $100,000 to purchase a transcript of the anticipated 2-3 month trial, if the event it obtained an adverse judgment in the trial court. The founders of Nabcor are unable to devote substantial time to marshalling evidence and locating witnesses because of their need to obtain employment to pay for basic necessities of life. Also, the lack of funds has prevented Nabcor from making needed appeals (such as from the denial of a preliminary injunction motion). Thus, the lack of funds has

prevented plaintiff and his clients in the Nalcor Action from obtaining meaningful access to the courts and has thereby prevented them from expressing themselves politically in this area of utmost important to them and the country. This lack of funds has in fact prevented plaintiff and his clients from exercising their First Amendment freedom of speech and assembly, and has prevented them from obtaining (through discovery and investigations) the information needed relating to the alleged conspiracy and monopoly, thereby preventing such information from being made available to the public as well.

Business Roundtable

13. Even though many antitrust plaintiffs and their counsel are effectively prevented from enforcing their claims, the opportunities for major companies to prevent antitrust enforcement and stronger antitrust legislation are not similarly curtailed. The largest 158 corporations and their respective Presidents have formed an organization called Business Roundtable, located at 888 17th Street, N.W., Washington, D.C. (See Exhibit B hereto for a list as of June 16, 1975 of members of the Business Roundtable, a list which was to be treated with the "utmost confidentiality" according to Executive Director John Post, until it was published against the wishes of the Business Roundtable at pp. 613-617 of the Hearings on the Antitrust Improvements Act of 1975 before the Senate Judiciary Committee's Subcommittee on Antitrust and Monopoly, 94th Congress, 1st Session, during May 7 and 8, June 3, 4, and 12, 1975. Page 614 states that Roger M. Blough, Esq. of Messrs. White & Case (counsel to the Bar Association in this action) is the counsel to Business Roundtable. *

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* Page 258 of the 1971 Year Book of defendant Bar Association shows that Messrs. White & Case contributed (as of July 1, 1971) $25,000 or more to defendant Bar Association. Only 29 other law firms in the country, according to the Year Book, made a similar contribution. Also, the late Orison S. Marden, Esq., a member of White & Case, was president of the Bar Association (1960-2), NYS (1964-5) and ABA (1966-7). p. 767-8B, Martindale's.

14. The existence of the Business Roundtable became known to the general public through a recent front-page article in the New York Times on Sunday, November 16, 1975 (a copy of which is annexed hereto as Exhibit A). Ace reporter Eileen Shanahan of The New York Times reported in part as follows:

> "ANTITRUST BILL STOPPED BY A BUSINESS LOBBY
>
> "Top Executives United in New Group to Block Plan for Suing a Company
>
> "Washington, Nov. 15 — A carefully organized lobbying effort, chiefly directed by a little-known organization whose members are all giant corporations, has succeeded in killing a proposed major amendment to the antitrust laws. Similar efforts against other legislation are in process and planned. ***
>
> "The Business Roundtable has an annual budget of 'around $1.5 million,' according to its executive director, John Post, although most expenses of its lobbying campaigns are borne by the individual companies who send their executives to Washington to talk to members of Congress.
>
> "The money to run the Roundtable comes from the corporate members' dues, which range from $2,500 to $35,000 a year,* depending on the size of the company, according to Mr. Post.
>
> "The legislation killed 10 days ago by the lobbying of Business Roundtable members, together with the efforts of a few non-member corporations, would have given the attorneys general of the 50 states authority to sue violators of antitrust law on behalf of their state and to collect money damages. * * *
>
> "An unusual aspect of the Roundtable's successful lobbying against this bill is that the measure was killed in the House Rules Committee, after its corporate opponents had succeeded in having the measure amended, but not in stopping it, in the House Judiciary Committee.
>
> "Aware of Business Lobby
>
> "Members of the Rules Committee on both sides of the issue agree that it was business lobbying that killed the bill and they also say they were aware of the Business Roundtable as the major orchestrator of the lobbying.
>
> "'The Business Roundtable, that's the name I keep hearing,' said Richard Bolling, Democrat of Missouri, one of the three members of the 16-man Rules Committee.... * * *

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* GM, as the 1st or 2nd largest member of the Business Roundtable, presumably is the 1st or 2nd largest contributor.

"Mr. Rolling said he had been approached on the legislation by representatives of four or five corporations, among them General Motors Corporation.... (Emphasis supplied.)

* * *

"Another lobbyist whose name was mentioned by many Rules Committee members was Arnold M. Pickering, one of the largest and best-known firms.

"Mr. Lerman has confirmed that he was retained by the Business Roundtable to work for defeat of the antitrust bill. * * *

"Mr. Lerman also said that he had called a number of chief counsels of companies that are Roundtable members 'and told them there was a very serious problem and they ought to be concerned and doing somthing about it.'

"Lawyers Did Main Work

"These 'house counsels' — lawyers who are on the payrolls of Business Roundtable companies — carried the main burden of the successful effort to defeat the antitrust bill, according to Mr. Post. * * *

"Ordinarily, it is the corporate presidents or board chairmen who lobby for the Business Roundtable lobbying, Mr. Post said.... * * *

"The businesses that fought the legislation principally argued that, if it were enacted, politically ambitious state attorneys general would file lawsuits that could cost companies millions — in some cases, so much money that the company might have to go out of business. * * *

"Advocates of the legislation argued that only the fear of potentially large damage awards would provide an effective deterrent to various types of illegal collusion among businesses.

"The lobbying effort on this antitrust bill was organized within the Roundtable by an antitrust group that was created early this year. It is headed by Robert S. Hatfield, chairman of the board of Continental Can Company, Inc.

"Businessmen 'Concerned'

"Mr. Post said that the special antitrust group had been set up because Roundtable members 'were getting concerned about the attacks on "economic concentration."'

"This is the phrase used by those who feel that too few corporations control too much of the production in a given industry or the economy as a whole.

"Members of the Roundtable, according to Mr. Post, are concerned about a large number of proposals for amending the antitrust laws that are pending before the Senate Antitrust Subcommittee and they are already working to modify or defeat them.

"He said the business executives were also concerned ... about investigations by the Federal Trade Commission into alleged excessive 'concentration' of economic power in a number of industries.

"'The whole theme of the Business Roundtable is to get the chief executive of the companies involved,' Mr. Post said.

"Thus, when the recent antitrust bill came to Mr. Post's attention, while it was still in the Judiciary Committee, he told every member of the Roundtable about the bill, its probable dangers, and the desirability of a lobbying effort against it.

"Mr. Lerman said that he thought the great value of the Business Roundtable was that 'it provides a way by which the company executives can exchange information and views and communicate throughout the business community in a broader way than they have before.' * * *

"Mr. Post was responsive to most questions about the Roundtable's activities, but was reluctant to say what legislation outside the antitrust area the organization might now be involved in. When pressed, he did say that he thought the Roundtable had helped to reduce the vote by which Congress recently passed legislation creating a Consumer Protection Agency. The victory margin was narrow enough to make it unlikely that the bill could be passed over President Ford's expected veto. * * *

"In addition to its legislative activities, the Business Roundtable also finances litigation on behalf of small and middle-sized companies, when the Roundtable thinks the litigation has potential importance to other companies, Mr. Post said."

The Relevance of Business Roundtable Activities

15. The above-described activities of Business Roundtable are extremely relevant in this action for various reasons, including the following:

(a) The problem of plaintiff and his clients theoretically could be cured by legislative relief (to provide some type of mandatory financing or regulatory assistance), but any

such legislative relief would be political and, therefore, could not be obtained through judicial intervention; and the activities of Business Roundtable could be expected to prevent the passage of any remedial legislative proposals;

(b) Under the federal and state antitrust laws, any assistance to private persons with antitrust claims cannot be obtained as a matter of right. Enforcement of these laws by the Justice Department, Federal Trade Commission and appropriate State authorities (such as defendant Attorney General of New York State) is purely discretionary, which discretion is often exercised on a political basis. None of these agencies provided any meaningful relief to plaintiff or his clients after repeated requests for relief, even though the Justice Department advised my clients they had enough to establish civil liability; after several years we are still waiting for the New York State Attorney General to respond. Donald I. Baker, Chief, Evaluation Section, Antitrust Division, Department of Justice, during his June 6, 1969 address on "The Role of Private Actions in Antitrust Enforcement" before the Institute of Continuing Legal Education, University of Michigan, said:

> "The Antitrust Division has limited resources to meets its sweeping responsibility in a growing economy. We need help.
>
> "The Government's perspective is necessarily different from that of any 'private attorney general'. We are charged with the responsibility of enforcing the antitrust law and promoting competition across the broad range of the economy. Our role is not only to bring lawsuits, but to persuade private industry to act <u>voluntarily</u> in a procompetitive manner. This makes it particularly important that we select cases and utilize theories designed to promote competition. * * *

"The private plaintiff must necessarily be concerned principally with his own situation. The plaintiff's lawyer is an advocate entitled to argue any theory which he thinks will win the case — regardless of whether it is likely to be procompetitive in its broader application. The plaintiff's own financial loss must be the major consideration in deciding to bring suit. * * * In sum, the private plaintiff's approach to antitrust enforcement is likely to be quite different from the Government's in many areas. In diversity, one hopes for strength.

"The private action makes at least two basic contributions to over-all antitrust enforcement. First, it provides a strong financial deterrent to horizontal price fixing and other hard-core per se offenses. Secondly, private actions have provided a direct form of relief for many largely private types of disputes where the government agencies have not acted.... * * *

"The availability of this effective private remedy against price fixing is extremely important to over-all antitrust enforcement. Price fixing is a continuing danager and it can have very serious economic effects. Measured in these terms, the Government's remedies are modest at best. * * *

"* * * To summarize, the Antitrust Division will no doubt continue to spend a very substantial proportion of its resources on suspected price fixing, but we shall have to continue to look to the private plaintiff for an additional strong deterrent.

"I mentioned a second important aspect of private antitrust enforcement: it offers relief where the Government will not or cannot take action. This situation often reflects the shortage of available Government enforcement resources. Thus, we are often obliged to leave largely private disputes to the parties themselves — for example, in the fields of franchising and distribution. * * * ...we should benefit from the Supreme Court's 1968 Perma Life Muffler decision. ... said the Court, 'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating behavior in violation of the antitrust laws.' * * *

"* * * We do, from time to time, write amicus briefs in private cases involving important questions of antitrust policy. Normally, this is done only in the Supreme Court, and the activity is under the control of the Solicitor General.

(Footnote: "The Government has not participated as an appellee in lower court proceedings for a variety of reasons — including limitations on available resources.")

Lee Loevinger, former Assistant Attorney General in Charge of the Antitrust Division wrote in a law review article, "Private Action — The Strongest Pillar of Antitrust", Vol. 111, No. 2 Antitrust Bulletin Mar.-Apr. 1968:

> "But I should like to urge ... upon the Congress ... the great importance of careful and competent study of this entire field. I submit that the problems with which the antitrust laws are concerned — the problems of the distribution of power within society — are second only to the questions of survival in the face of threats of nuclear weapons in importance for our generation.
>
> * * *
>
> "As between enforcement by government agencies and by private parties, there are a number of reasons to believe that action by private parties is both more desirable and more effective. First, private action automatically puts a host of interested and well informed persons in the enforcement force. It would take a vast bureaucratic army of government agents to begin to equal the effectiveness of interested private parties in policing the antitrust laws. One former Assistant Attorney General in charge of the Antitrust Division testified that lacking the enforcement aid of private suits the division would require an appropriation of at least four times as great as it normally receives in order to achieve equal enforcement. My own guess is that even a quadruple appropriation for the Antitrust Division would not equal the enforcement effectiveness of private action. * * *
>
> "Second, and perhaps most important, the burden of antitrust litigation is so great that private parties are often unable or unwilling to undertake such lawsuits regardless of the violations involved or the injuries suffered. Congress and the country have heard many articulate spokesman for antitrust defendants complain because of the heavy burden of defending an antitrust prosecution, because of the mass of evidence involved, the length of trial, the complexity of the issues, and the time required

of the businessmen involved. But it should be apparent that this burden is even greater for a plaintiff in such a case than for the defendant. It is greater for the plaintiff because the plaintiff has the burden of proof, the burden of discovering and presenting evidence — and evidence which is usually in the possession of the defendants — and the burden of initiating and going forward with the case which the defendant is later called upon to answer. When the plaintiff is the government, this burden is an obstacle only within the limits of the current departmental budget. But when the plaintiff is a private party the situation is quite different. As a practical matter, a business victim of antitrust violation cannot undertake any action for vindication of his rights unless he is willing and able to wait at least two or three years — and often longer — for the decision of his case, is able to advance at least several thousand dollars in probable costs of preparing and presenting his case, and is prepared to withstand the social and economic pressures and the threat of reprisal and retaliation that not infrequently are the lot of the antitrust plaintiff.

" * * * ...the Supreme Court has recognized that Congress sought to favor the private antitrust litigant. Nevertheless, many courts have an attitude of definite hostility to private antitrust suits; and the decisions are stricter in their interpretation of the laws and more rigorous in this requirements of proof in private suits than in government actions under the antitrust laws.

" * * * The necessity of utilizing the discovery procedures to secure evidence and the necessity to be prepared to meet the defensive use of such procedures if employed to create financial hurdles for the plaintiff require that a small business victim of antitrust violation have at least several thousand dollars available for out-of-pocket expenses — not including legal fees — before undertaking private legal action. * * *

"Reference is sometimes made to the possibility of abuse of the right of private action under the antitrust laws. * * * However, in the antitrust field, the obstacles to private action are so great, the legal skill and effort required for successful prosecution of an action is so demanding, and the defenses ordinarily available to defendants are so formidable that the possibility of abuses of the right of action or of unjustified suits is reduced to a minimum. In this connection it should be pointed

out that plaintiffs have ultimately prevailed in only a minority of the cases filed and in an astonishingly small number of total cases under the antitrust laws. However, an examination of the cases convinces me that this is due more to the difficulty of obtaining evidence and the attitude of the courts than it is to the groundless filing of claims without merit. In any event, the actual record of the courts in this field proves that an antitrust defendant need have little fear of unjustified recovery against him.

"If, as has been suggested, private action is the most important pillar of antitrust enforcement but the difficulties and obstacles of such action seriously handicap a small business victim of predatory practices from obtaining relief, the question arises: What could Congress do to aid small business in securing effective remedies against antitrust violations? * * *

"* * * ....it is paradoxical that at the present time suits prosecuted by the government largely on the basis of illegal injury to small private business are often disposed of without hearing or considering the viewpoint of the business victims. Further even when protective decrees are entered for the benefit of such small business victims, they are dependent upon the favor or the resources of the Department of Justice to see that the decrees are enforced, and under prevailing law are unable to ask the court directly for enforcement of the decrees for their own protection. Too often, the government is busy with new suits, is limited in its resources, or regards its mission as the accomplishment of broader objectives than the protection of a single injured small business, and so the decrees simply are not enforced and do not achieve their purpose. * * *

"Twelfth, the right to recover treble damages for injuries suffered as the result of antitrust violations should be preserved against all attempts to weaken or amend it. This right has been inherited from the common law, antedating even our Constitution. * * *

"* * * ...I respectfully submit that this subject matter is one of great national importance...."

(c) Private enforcement of the antitrust laws is a victim's means not only of obtaining recovery, but of acting as a private attorney general and assisting in a political act of determining how the wealth of the country is to be allocated. This is a substantial and effective means of political expression for plaintiff and his clients with antitrust claims.

(d) Plaintiff is attorney for his clients in an antitrust action (the Nabcor Action) brought against 63 named defendants, including General Motors Corporation, General Motors Acceptance Corporation, Ford Motor Company, Chrysler Corporation and First National City Bank. Each of these defendants is a member of the Business Roundtable (GMAC as a subsidiary of GM). Also named as defendants in the Nabcor Action are James M. Roche, former President and Board Chairman of GM; Frederic G. Donner, former President and Board Chairman of GM; Semon E. Knudsen, former official of GM; Henry Ford, II and Lee Iacocca, President of Ford Motor Company. The activities of these corporate defendants (and their officials) through the Business Roundtable may be considered "political", including their attempts to defeat antitrust actions brought against them or other major corporations. In fact, the Business Roundtable is even financing the defense of actions against non-members deemed of major importance to the 158 members. It can be assumed that this includes the defense of antitrust actions, because of the primary interest of the Business Roundtable in preventing enactment of remedial antitrust legislation; also, GM (acting on behalf of the other Nabcor defendants, including

other members of the Business Roundtable) is engaging in excessive litigation practices which, if such practices are used repeatedly in other antitrust litigation involving GM or its counsel, could be considered illegal under the Supreme Court's decision in California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972) - see pp. 20-23 of the accompanying memorandum of law. Accordingly, the activities of the Business Roundtable and its 158 members with respect to the defeat of antitrust legislation and enforcement is considered by Business Roundtable to be political activity, protected by the 1st Amendment, arguably, as a means of political expression for the 158 corporate members and their respective Presidents.

(e) These 158 corporations have assets well exceeding 50% of the net assets of the 500 largest industrial companies in the United States (the "Fortune 500"), which can be determined by comparing the $310,000,000,000 ($310 billion) in net assets of the Fortune 500 (p. 228 of Fortune Magazine, May, 1975) with the $146 billion in net worth of only 113 of the 158 corporations (the others are not industrial companies). The Business Roundtable and its members have, realistically, unlimited amounts of money (amounting to billions of dollars) through their pooling of money, legal and other resources to exercise their own form of political expression, by defeating antitrust legislation and litigation against non-members. Thus, these 158 corporations are using unlimited amounts of money and business assets in exercise of their alleged political rights (freedom of speech and freedom of assembly) and in promoting state action (according

to plaintiff's complaint herein) to restrict plaintiff and his clients from exercising their similar rights to obtain greater enforcement of the antitrust laws through favorable judicial precedents and monetary judgments.

(f) On the other hand, plaintiff and his clients are prevented by the state action of which plaintiff complains, and the conspiracy to restrain trade (count 1), from alienating their c[illegible]perty interests in the antitrust claims to the extent the proceeds would be used to exercise this means of political expression by them. The result, plaintiff alleges, is a denial or due process, a denial of equal protection, a denial of the right to freedom of speech and the right to assembly, a denial of the right to petition the courts and agencies of government for a redress of grievances, and an abridgment of privileges and immunities, among other rights. In fact, plaintiff apparently cannot even reduce his 35% contingent-fee interest in the Nabo[illegible] Actio[illegible]n by sale to a third party when the proceeds are to be used solely to cover out-of-pocket expenses incurred by the clients, even though the clients under some instances would be legally able to do so. This results from the statute prohibiting plaintiff [illegible]rom "splitting fees" with a layman.

16. The documents sought by plaintiff through the subpoena duces tecum served on Business Roundtable are relevant for the following reasons:

Request No. 1. Documents reflecting the organization and capitalization of Business Roundtable would tend to identify the persons who are part of the alleged conspiracy, the scope of the alleged conspiracy and

the amount of money and other resources available to defeat antitrust legislation and litigation by unlawful interference and excessive activities intended to achieve an illegal end result of denying plaintiff, his clients and others from meaningful access to the courts and agencies.

Request No. 2. List of all members of Business Roundtable would indicate the resources available to the members of the conspiracy and the identities of the members of the conspiracy.

Request No. 3. Documents reflecting receipt of income or property, which would show whether the Business Roundtable has any financial interest in actions the defense of which is financed by it and any persons who have an interest in the activities of the Business Roundtable other than by full membership; also, it would tend to show the basis upon which contributions were made.

Request No. 4. Document reflecting lobbying activity relating to antitrust bills would show the extent to which this group has engaged in political activity or excessive political activity relating to the antitrust field, and would tend to support plaintiff's view that activities in the field of antitrust are truly political, as well as the amount of money and effort spent.

Request No. 5. Documents reflecting expenses for the lobbying activities described in the preceding request would show the amount of money the Business Roundtable has spent in its political efforts, and would invite comparison to the amount of money available to plaintiff and his clients with respect to the same political activity, to provide a measure for what may be considered "excessive" under the California Motor Transport decision.

Request No. 6. Records showing campaign contributions or assistance would show the extent to which the Business Roundtable or its members have used their organization to bring combined political and economic

pressure upon candidates for office, for the purpose of obtaining their desired legislative action with respect to any proposed antitrust legislation, which would support plaintiff's claim of excessive lobbying activities, with an illegal end result.

Request No. 7. Records relating to the cost of defending or prosecuting antitrust litigation would show the difficulties which prevent the typical antitrust victim from obtaining justice, more so when the activities of the Business Roundtable and its members in financing the defense of litigation are added to such difficulties.

Request No. 8. Minutes or notes of Business Roundtable meetings relating to antitrust bills or proposals would tend to show the purpose of the Business Roundtable in opposing legislation and the means by which the opposition is mounted. The means themselves may be illegal, at least when they are excessive, and certainly would involve unregulated costs which should be compared with the plaintiff's inability to alienate his own property (the percentage of his clients' antitrust claims) to obtain the same type of lobbying efforts. Also, this would help plaintiff in demonstrating his need for the First Amendment freedoms, in comparison to any state interest in the state action about which plaintiff complains.

Request No. 9. documents relating to any financing of the defense or prosecution of any antitrust litigation by the Business Roundtable or any of its members would show the futility of plaintiff's efforts in bringing antitrust actions against large companies when the defense is to be financed by Business Roundtable, or any of its members (as is alleged to be occurring in the Nabcor Action) thereby effectively barring plaintiff

and his clients from meaningful access to the courts, from obtaining a redress of greivances, and from exercising their political right to bring meritorious antitrust suits.

Request No. 10. Documents relating to plaintiff, his Nabcor clients, and persons interested in providing financing to the plaintiff and Nabcor plaintiffs would show the extent to which a conspiracy exists in preventing plaintiff and his clients from obtaining relief in the courts, and at the same time in preventing plaintiff and his clients from obtaining the money needed to finance the Nabcor action properly. (Annexed as Exhibit C hereto is a copy of a letter from Gannett Publications, a wholly-owned subsidiary of which is a defendant in the Nabcor Action) to Public Equity Corporation in a brazen attempt to interfere with the proposed financing of the Nabcor Action. GM's counsel told plaintiff he was aware of the article in Automotive News and presumably he sent a copy of the article to Gannett, with instructions to contact President Thomas B. Mechling, in furtherance of the conspiracy alleged in plaintiff's complaint herein.)

Request No. 11. Documents relating to actual or threatened attacks on economic concentration by government, plaintiff or others would show the extent to which the activities of the Business Roundtable are political and illegal, and involve an attempt to pool the resources of the largest corporations in the world in a massive combination to defend themselves against government regulation and private antitrust law enforcement, contrary to the intentions of the Congress, courts and U. S. Constitution.

Request No. 12. By-Laws of the Business Roundtable would tend to show the procedures whereby any financing of the defense of antitrust

litigation against non-members is carried out, as well as other purposes of the Business Roundtable.

Request No. 13. Handbooks, memoranda, instruction setting forth position descriptions, operating procedures, purposes and objectives of the Business Roundtable would tend to show how any financing of the defense of antitrust suits against non-members is to be carried out, how much is to be spent, what types of actions are to be so defended, who is to agree on the financing of the defense, and the extent to which the resources of the combination can be utilized by members or non-members, in a gigantic, illegal conspiracy to prevent government and private antitrust litigants from having their day in court.

Request No. 14. Documents relating to the financial ability or inability of any persons with antitrust claims to enforce their rights may well show how much money need be spent by the Business Roundtable to prevent a private litigant from enforcing his rights, and would tend to show how successful the combination can be in comparison to the amount of money or other assets available to the typical antitrust litigant. This would allow the combination to determine how much to assess their members, in order to prevent private plaintiffs from obtaining justice in antitrust litigation.

Request No. 15. Documents relating to the effectiveness of the Justice Department, Federal Trade Commission or any state Attorney General (or similar state official) would have the same purpose as for Request No. 14 above, and may show the extent to which government officials or agencies have been unable or unwilling to enforce the federal and state antitrust laws, as well as the reasons (including any conspiratorial activities) for any such wilful policy of non-feasance.

Request No. 16. Documents relating to the economic or political objectives of the Business Roundtable or any of its members would show that the antitrust field is truly political, and that the objective of the Business Roundtable and its members in trying to obtain non-enforcement of the antitrust laws would be to obtain greater concentration until the 100% level is reached, and only 1 corporation remains.

10. In passing, the affidavit of Daniel M. Cohen, Esq., on behalf of the defendants other than the Bar Association should be disregarded as conclusory and patently erroneous. It claims that plaintiff is harrassing defendants by the detailed discovery sought and the concomitant burdens, financial and otherwise. First of all, this is my first attempt to obtain any discovery in the action, which means that the deposition could not be a "harrassment". Also, I would like to point out that the need for this action would not have existed if the Attorney General had done his job and investigated my written complaints, then taken appropriate action. Instead, I have heard nothing whatever after spending perhaps 100-200 hours in preparing materials for submission to the Attorney General. Looking back, I can see a substantial needless burden and total waste of time and money, which I can honestly say was a harrassment. The time and money would have been much better spent on the Nabcor Action than attempting to obtain any governmental assistance. The truth is that the discovery is of a non-party witness, Business Roundtable, which involves no burdens whatever on any of the defendants (particularly if they are truly convinced that all of the discovery sought by plaintiff would be irrelevant in any event).

Carl E. Person

Subscribed and sworn to before me
this 2nd day of December, 1975

[illegible]
Notary Public

[illegible]
Notary Public, State of New York
No. 60-[illegible]
Qualified in Nassau County
Commission Expires March 30, 19[illegible]

Antitrust Bill Stopped By a Business Lobby

Top Executives United in New Group To Block Plan for Suing a Company

By EILEEN SHANAHAN
Special to The New York Times

WASHINGTON, Nov. 15—A carefully organized lobbying effort, chiefly directed by a little-known organization whose members are all giant corporations, has succeeded in killing a proposed major amendment to the antitrust laws. Similar efforts against other legislation are in process and planned.

The organization is the Business Roundtable, whose 158 corporate members range, alphabetically, from the Allis-Chalmers Corporation to Xerox Corporation. Its members include the three largest automobile manufacturers, the three largest banks, seven of the largest oil companies, the largest steel companies, major retailing organizations and many of the largest utilities, including American Telephone and Telegraph Company.

The Business Roundtable has an annual budget of "around $1.5 million," according to its executive director, John Post, although most expenses of its lobbying campaigns are borne by the individual companies who send their executives to Washington to talk to members of Congress.

The money to run the Roundtable comes from the corporate members' dues, which range from $2,500 to $35,000 a year, depending on the size of the company, according to Mr. Post.

The legislation killed 10 days ago by the lobbying of Business Roundtable members, together with the efforts of a few nonmember corporations, would have given the attorneys general of the 50 states authority to sue violators of antitrust law on behalf of the citizens of their state and to collect money damages.

The damages, which could run to many millions of dollars in some cases, would have been three times the amount of any overcharges that had resulted from company actions, such as

Continued on Page 74, Column 3

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November 16, 1975

Exhibit A

Continued From Page 1, Col. 2

price-fixing agreements, that had been found to be illegal.

The money would have been paid back to the persons injured by the illegal actions, insofar as they could be identified, and any left-over money would have been kept by the state to use for valid public purposes related to the injury inflicted on the state's citizens.

For example, damages collected from drug companies might have been used to finance public health services.

An unusual aspect of the Roundtable's successful lobbying against this bill is that the measure was killed in the House Rules Committee, after its corporate opponents had succeeded in having the measure amended, but not in stopping it, in the House Judiciary Committee.

Aware of Business Lobby

Members of the Rules Committee on both sides of the issue agree that it was business lobbying that killed the bill and they also say they were aware of the Business Roundtable as the major orchestrator of the lobbying.

"The Business Roundtable, that's the name I keep hearing," said Richard Bolling, Democrat of Missouri, one of the three members of the 16-man Rules Committee who voted to permit the bill to go before the House of Representatives for a vote. The majority of the committee voted to send the bill back to the Judiciary Committee for further consideration.

Mr. Bolling said he had been approached on the legislation by representatives of four or five corporations, among them, General Motors Corporation and Bristol-Myers Company.

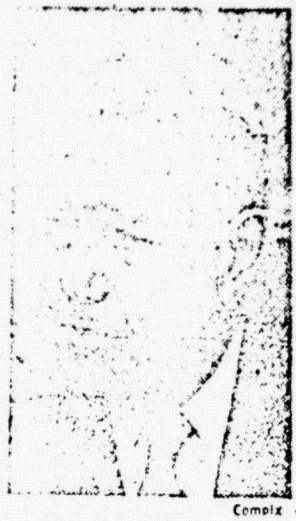
Bristol-Myers, the drug company, is not a member of the Business Roundtable. Its chief lobbyist on the antitrust bill was Philip A. Lacovara, a lawyer now in private practice here. Earlier, as a member of the staff of the Watergate special prosecutor, he argued Nixon v. United States—the case for release of President Nixon's tapes, before the Supreme Court.

Another lobbyist whose name was mentioned by many Rules Committee members was Arnold M. Lerman of Wilmer, Cutler & Pickering, one of the largest and best-known firms.

Mr. Lerman has confirmed that he was retained by the Business Roundtable to work for defeat of the antitrust bill. He said:

"I was kind of an idea guy. I did the legal analysis so the company executives could talk to members of Congress about the problems with the bill."

Mr. Lerman also said that he had called a number of chief counsels of companies that are Roundtable members "and told them there was a very serious problem and they ought to be concerned and doing something about it."



Complx

Robert S. Hatfield, chairman of Continental Can Company, headed business group's lobbying on the antitrust bill.

Associated Press

Philip A. Lacovara lobbied for Bristol-Myers.

Lawyers Did Main Work

These "house counsels"—lawyers who are on the payrolls of Business Roundtable companies—carried the main burden of the successful effort to defeat the antitrust bill, according to Mr. Post. The reason, he said, was that this legislation was so complex and technical that the corporate chief executives were not well qualified to discuss it with members of Congress.

Ordinarily, it is the corporate presidents or board chairmen who lobby for the Business Roundtable lobbying, Mr. Post said, often bringing with them

BEST COPY AVAILABLE

New Lobby of Leaders of Nation's Major Companies

"a" plant manager from the Congressman's area.

"It's much more impressive," he said, "if the plant manager can talk about the jobs that might be lost in the Congressman's own district if a particular piece of legislature goes through."

The businesses that fought the legislation principally argued that, if it were enacted, politically ambitious state attorneys general would file lawsuits that could cost companies millions — in some cases, so much mone that the company might have to go out of business at the same time, it was argued, the individual citizens of a state would eceive economically insignificant sums of money, perhaps less than $1 in many cases.

Many of the detailed provisions of the bill, such as the manner in which the damages were to be established, were also attacked by the business lobbyists.

Advocates of the legislation argued that only the fear of potentially large damage awards would provide an effective deterrent to various types of illegal collusion among businesses.

The lobbying effort on this antitrust bill was organized by an antitrust group of the Business Roundtable, which was created early this year. It is headed by Robert S. Hatfield, chairman of the board of Contietal Can Company, Inc.

Businessmen 'Concerned'

Mr. Post said that the special antitrust group had been set up because Roundtable members "were getting concerned about the attacks on 'economic concentration.'"

This is the phrase used by those who feel that too few corporations control too much of the production in a given industry or the economy as a whole.

Members of the Roundtable, according to Mr. Post, are concerned about a large number of proposals for amending the antitrust laws that are pending before the Senate Antitrust Subcommittee and they are already working to modify or defeat them.

He said the business executives were also concerned about a recent surge of talk about establishing a national economic planning agency; about presentations now being made to the Council on Wage and Price Stability that allege that some price increases have been unjustified; and about investigations by the Federal Trade Commission into alleged excessive "concentration" of economic power in a number of industries.

"The whole theme of the Business Roundtable is to get the chief executive of the companies involved," Mr. Post said.

This, when the recent antitrust bill came to Mr. Post's attention, while it was still in the judiciary committee, he told every member of the Roundtable about the bill, its probable dangers, and the desirability of a lobbying effort against it.

Mr. Lerman said that he thought the great value of the business roundtable was that "it provides a way by which the company executives can exchange information and views and communicate throughout the business community in a broader way than they have before."

He explained that, previously, executives within an industry generally received alerts through their trade associations about legislation that others in the industry feared might be harmful, but that there had been little communication between different industries.

Mr. Post was responsive to most questions about the Roundtable's activities, but was reluctant to say what legislation outside the antitrust area the organization might now be involved in. When pressed, he did say that he thought the Roundtable had helped to reduce the vote by which Congress recently passed legislation creating a Consumer Protection Agency. The victory margin was narrow enough to make it unlikely that the bill could be passed over President Ford's expected veto.

Mr. Post said the Roundtable had also been involved in the successful effort to get the House Ways and Means Committee to postpone consideration of changes in the tax on profits earned overseas by American corporations.

The Roundtable is "somewhat" involved in the effort to get natural gas prices decontrolled and in environmental legislation, he said.

In addition to its legislative activities, the Business Roundtable also finances litigation on behalf of small and middle-sized companies, when the Roundtable thinks the litigation has potential importance to other companies, Mr. Post said.

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THE BUSINESS ROUNDTABLE,
Washington, D.C., July 18, 1975.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly, Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed herewith are lists which relate to the membership of The Business Roundtable. This is in response to your request to Arnold Lerman, Esq., when he testified on June 6, 1975, on behalf of The Business Roundtable before your Subcommittee in connection with S. 1284.

List A contains the names of the members of the Roundtable's Policy Committee as of June 16, 1975; it includes new directors elected on that date. (Our letterhead's list of Policy Committee members is not up-to-date because a new letterhead is in preparation) List B is a list of all the member companies of the Roundtable.

Of course, we have no objection to providing you with these lists. We think you would appreciate knowing, however, that we have always treated List B with utmost confidentiality. We are concerned that it might be used for solicitation by others for funds, memberships and other types of support. Only on rare occasions have we supplied it to a member and then on condition that it be handled as confidential and used only on business of the Roundtable. We trust, therefore, that you will find it unnecessary to publish List B in the record of the hearings, although we recognize that the decision is entirely up to you.

If you have any questions about either or both lists, we would be glad to answer them.

Sincerely yours,

JOHN POST,
Executive Director.

[Enclosure.]

"A" List—June 16, 1975.

THE BUSINESS ROUNDTABLE

POLICY COMMITTEE

Chairman

Mr. John D. Harper, Chairman, Aluminum Co., of America, 1501 Alcoa Building, Pittsburgh, Pa. 15219.

Cochairman

Mr. John D. deButts, Chairman, American Telephone & Telegraph Co., 195 Broadway, New York, N.Y. 10007.

Cochairman

Mr. Howard J. Morgens, Chairman, Executive Committee, The Procter & Gamble Co., P.O. Box 599, Cincinnati, Ohio 45201.

Mr. William O. Beers, Chairman, Krafteo Corp., Krafteo Court, Glenview, Ill. 60025.

Mr. Frank T. Cary, Chairman, International Business Machines Corp., Old Orchard Road, Armonk, N.Y. 10504.

Mr. Alden W. Clausen, President, Bank of America, Bank of America Center, San Francisco, Calif. 94120.

Mr. E. M. de Windt, Chairman, Eaton Corp., 100 Erieview Plaza, Cleveland, Ohio 44114.

Mr. Charles D. Dickey, Jr., Chairman, Scott Paper Co., Scott Plaza, Philadelphia, Pa. 19113.

Mr. Edward R. Eberle, Chairman, Public Service Electric & Gas Co., 80 Park Place, Newark, N.J. 07101.

Mr. Robert S. Hatfield, Chairman, Continental Can Company Inc., 633 Third Avenue, New York, N.Y. 10017.

Mr. William A. Hewitt, Chairman, Deere & Co., John Deere Road, Moline, Ill. 61265.

Mr. Frederick G. Jaicks, Chairman, Inland Steel Co., 30 West Monroe Street, Chicago, Ill. 60603.

Mr. J. K. Jamieson, Chairman, Exxon Corp., 1251 Avenue of the Americas, New York, N.Y. 10020.

Exhibit B

Mr. Reginald H. Jones, Chairman, General Electric Co., Fairfield, Conn. 06431.
Mr. Robert E. Kirby, Chairman, Westinghouse Electric Corp., Gateway Center, Pittsburgh, Pa. 15222.
Mr. William F. LaPorte, Chairman, American Home Products Corp., 685 Third Avenue, New York, N.Y. 10017.
Mr. Ralph Lazarus, Chairman, Federated Department Stores, Inc., 222 West Seventh Street, Cincinnati, Ohio 45202.
Mr. Ian K. MacGregor, Chairman, AMAX Inc., Amax Center, Greenwich, Conn. 06830.
Mr. Robert H. Malott, Chairman, FMC Corp., 200 East Randolph Drive, Chicago, Ill. 60601.
Mr. C. Peter McColough, Chairman, Xerox Corp., Stamford, Conn. 06904.
Mr. Louis W. Menk, Chairman, Burlington Northern, Inc., 176 East Fifth Street, St. Paul, Minn. 55101.
Mr. Frank R. Milliken, President, Kennecott Copper Corp., 161 East 42nd Street, New York, N.Y. 10017.
Mr. Roger Milliken, President, Deering Milliken, Inc., P.O. Box 3167, Spartanburg, S.C. 29302.
Mr. Thomas A. Murphy, Chairman, General Motors Corp., General Motors Building, Detroit, Mich. 48202.
Mr. David Packard, Chairman, Hewlett-Packard Co., 1501 Page Mill Road, Palo Alto, Calif. 94303.
Mr. Charles J. Pilliod, Jr., Chairman, The Goodyear Tire & Rubber Co., 1144 East Market Street, Akron, Ohio 44316.
Mr. Irving S. Shapiro, Chairman, E. I. du Pont de Nemours & Co., Wilmington, Del. 19898.
Mr. Mark Shepherd, Jr., President, Texas Instruments Inc., P.O. Box 5475 Dallas, Tex. 75222.
Mr. J. Stanford Smith, Chairman, International Paper Co., 220 East 42nd Street, New York, N.Y. 10017.
Mr. Edgar B. Speer, Chairman, United States Steel Corp., 600 Grant Street, Pittsburgh, Pa. 15230.
Mr. George A. Stinson, Chairman, National Steel Corp., Grant Building, Pittsburgh, Pa. 15219.
Mr. O. Pendleton Thomas, Chairman, The B. F. Goodrich Co. 500 South Main Street, Akron, Ohio 44318.
Mr. W. Reid Thompson, Chairman, Potomac Electric Power Co., 1900 Pennsylvania Avenue, N.W., Washington, D.C. 20006.
Mr. C. C. Tillinghast, Jr., Chairman, Trans World Airlines Inc., 605 Third Avenue, New York, N.Y. 10016.
Mr. Lynn A. Townsend, Chairman, Chrysler Corp. 341 Massachusetts Avenue, Detroit, Mich. 48231.
Mr. Rawleigh Warner, Jr., Chairman, Mobil Oil Corp., 150 East 42nd Street, New York, N.Y. 10017.
Mr. F. Perry Wilson, Chairman Union Carbide Corp., 270 Park Avenue, New York, N.Y. 10017.
Mr. J. Robert Wilson, President Roadway Express Inc., 1077 Gorge Boulevard, Akron, Ohio 44309.
Mr. Arthur M. Wood, Chairman, Sears, Roebuck and Co., Sears Tower—Department 702, Chicago, Ill. 60684.
Mr. Walter B. Wriston, Chairman, First National City Corp., 399 Park Avenue, New York, N.Y. 10022.

Counsel

Mr. Roger M. Blough, White & Case, 14 Wall Street, New York, N.Y. 10005.

THE BUSINESS ROUNDTABLE

MEMBERSHIP LIST

"B" List

Allis-Chalmers Corp., 1126 S. 70th Street, Milwaukee, Wis. 53201.
Aluminum Company of America, Alcoa Building, Pittsburgh, Pa. 15219.
American Can Co., American Lane, Greenwich, Conn. 06830.
American Home Products Corp., 685 Third Avenue, New York, N.Y. 10017.
Amax Inc., Greenwich, Conn. 06830.
ASARCO Inc., 120 Broadway, New York, N.Y. 10005.

American Telephone and Telegraph Co., 195 Broadway, New York, N.Y. 10007.
The Anaconda Co., 25 Broadway, New York, N.Y. 10004.
Arizona Public Service Co., P.O. Box 21668, Phoenix, Ariz. 85036.
Armco Steel Corp., 703 Curtis Street, Middletown, Ohio 45042.
Armstrong Cork Co., Lancaster, Pa. 17604.
Atlantic Richfield Co., 515 South Flower Street, Los Angeles, Calif. 90071.
Babcock and Wilcox, 161 East 42d Street, New York, N.Y. 10017.
Bank of America, Bank of America Center, San Francisco, Calif. 94120.
The Bendix Corp., 10650 Civic Center Drive, Southfield, Mich. 48075.
Bethlehem Steel Corp., 701 East Third Street, Bethlehem, Pa. 18016.
The Boeing Co., P.O. Box 3707, Seattle, Wash. 98124.
Boise Cascade Corp., P.O. Box 200, Boise, Idaho 93701.
Borg-Warner Corp., 200 South Michigan Avenue, Chicago, Ill. 60604.
Burlington Industries, Inc., Box 21207, Greensboro, N.C. 27420.
Burlington Northern, Inc., 176 East 5th Street, St. Paul, Minn. 55101.
Campbell Soup Co., Camden, N.J. 08101.
Carolina Power and Light Co., Raleigh, N.C. 27602.
Carrier Corp., Carrier Tower, Syracuse, N.Y. 13201.
Carter Hawley Hale Stores, Inc., 600 South Spring Street, Los Angeles, Calif. 90014.
Caterpillar Tractor Co., 100 N.E. Adams Street, Peoria, Ill.
Certain-Teed Products Corp., P.O. Box 860, Valley Forge, Pa. 19842.
Champion International Corp., 777 Third Avenue, New York, N.Y. 10017.
Chase Manhattan Bank, 1 Chase Manhattan Plaza, New York, N.Y. 10005.
Chrysler Corp., P.O. Box 1919, Detroit, Mich. 48231.
Cincinnati Gas & Electric Co., 4th & Main Streets, Cincinnati, Ohio 45201.
Cities Service Co., P.O. Box 300, Tulsa, Okla. 74102.
Clark Equipment Co., 324 East Dewey Street, Buchanan, Mich. 49107.
Cleveland-Cliffs Iron Co., Union Commerce Building, Cleveland, Ohio 44101.
Cleveland Electric Illuminating, P.O. Box 5000, Cleveland, Ohio 44101.
The Coca-Cola Co., P.O. Drawer 1734, Atlanta, Ga. 30301.
Columbia Gas System, 20 Montchanin Road, Wilmington, Del. 19807.
Continental Can Co., 633 Third Avenue, New York, N.Y. 10017.
Continental Oil Co., High Ridge Park, Stamford, Conn. 06904.
Corning Glass Works, Corning, N.Y. 14380.
Crown Zellerbach Corp., One Bush Street, San Francisco, Calif. 94104.
Cyclops Corp., 650 Washington Street, Pittsburgh, Pa. 15228.
Dart Industries, Inc., P.O. Box 3157, Terminal Annex, Los Angeles, Calif. 90051.
Dayton Power & Light Co., 25 North Main Street, Dayton, Ohio 45401.
Deere & Co., John Deere Road, Moline, Ill. 61265.
Deering-Milliken Inc., P.O. Box 3168, Spartanburg, S.C. 29302.
Detroit Edison Co., 2000 2d Avenue, Detroit, Mich. 48226.
Dow Chemical Co., Midland, [illegible] 48640.
Dresser Industries, Inc., Repub[illegible] National Bank Building, Dallas, Tex. 75221.
E.I. duPont de Nemours & Co., Market Street, Wilmington, Del. 19898.
Eastern Air Lines, 10 Rockefeller Plaza, New York, N.Y. 10020.
Eaton Corp., 100 Erieview Plaza, Cleveland, Ohio 44114.
Eli Lilly & Co., 740 South Alabama Street, Indianapolis, Ind. 46225.
Esmark Inc., 55 East Monroe Street, Chicago, Ill. 60603.
Exxon Corp., 1251 Avenue of the Americas, New York, N.Y. 10020.
Federated Department Stores, 222 West 7th Street, Cincinnati, Ohio 45202.
Firestone Tire & Rubber Co., 1200 Firestone Parkway, Akron, Ohio 44317.
First National City Bank, 399 Park Avenue, New York, N.Y. 10022.
FMC Corp., 200 East Randolph Drive, Chicago, Ill. 60601.
Ford Motor Co., The American Road, Dearborn, Mich. 48121.
GAF Industries, 140 West 51 Street, New York, N.Y. 10020.
General Cable Corp., 500 West Putnam Avenue, Greenwich, Conn. 06830.
General Dynamics Corp., Pierre Laclede Center, St. Louis, Mo. 63105.
General Electric Co., Fairfield, Conn. 06431.
General Foods, Inc., 250 North Street, White Plains, N.Y. 10602.
General Mills, Inc., 9200 Wayzata Boulevard, Minneapolis, Minn. 55410.
General Motors Corp., 3044 West Grand Boulevard, Detroit, Mich. 48202.
General Tire & Rubber Co., Akron, Ohio 44309.
The B.F. Goodrich Co., 500 South Main Street, Akron, Ohio 44318.
Goodyear Tire & Rubber Co., 1144 East Market Street, Akron, Ohio 44316.
The Greyhound Corp., Greyhound Tower, Phoenix, Ariz. 85077.
Gulf Oil Corp., Gulf Building, Pittsburgh, Pa. 15230.

Gulf States Utilities Co., P.O. Box 2951, Beaumont, Tex. 77704.
Halliburton Co., 3211 Southland Center, Dallas, Tex. 75201.
The Hanna Mining Co., 100 Erieview Plaza, Cleveland, Ohio 44114.
H. J. Heinz Co., P.O. Box 57, Pittsburgh, Pa. 15230.
Hercules, Inc., 910 Market Street, Wilmington, Del. 19899.
Hewlett-Packard Co., 1501 Page Mill Road, Palo Alto, Calif. 94304.
Hoover Worldwide Corp., North Canton, Ohio 44720.
Ideal Basic Industries, Inc., 821 17th Street, Denver, Colo. 80202.
Ingersoll-Rand Co., Woodcliff Lake, N.J. 07675.
Inland Steel Co., 30 West Monroe Street, Chicago, Ill. 60603.
International Business Machines, Old Orchard Road, Armonk, N.Y. 10504.
International Harvester Corp., 401 North Michigan Avenue, Chicago, Ill. 60611.
International Nickel Co., 1 New York Plaza, New York, N.Y. 10004.
International Paper Co., 220 East 42d Street, New York, N.Y. 10017.
Iowa-Illinois Gas & Electric Co., Davenport, Iowa. 52802.
Irving Trust Co., One Wall Street, New York, N.Y. 10005.
Johns-Manville Corp., P.O. Box 5108, Denver, Colo. 80217.
Kaiser Industries Corp., 300 Palesode Drive, Oakland, Calif. 94604.
Kennecott Copper Co., 161 East 42d Street, New York, N.Y. 10017.
Koppers Co., Koppers Building, Pittsburgh, Pa. 15219.
Krafteo Corp., Krafteo Court, Glenview, Ill. 60025.
Libbey-Owens Ford, 811 Madison Avenue, Toledo, Ohio 43624.
McGraw-Edison Co., 333 West River Road, Elgin, Ill. 60120.
R. H. Macy & Co., 151 West 34th Street, New York, New York, 10001.
Marcor Inc., P.O. Box 6541, Chicago, Ill. 60607.
3M Co., 3M Center, St. Paul, Minn. 55101.
Middle South Services, P.O. Box 61000, New Orleans, La. 70161.
Mobile Oil Corp., 150 East 42d Street, New York, N.Y. 10017.
Monanto Co., 800 North Lindburgh Boulevard, St. Louis, Mo. 63166.
Nabisco, Inc., 425 Park Avenue, New York, N.Y. 10022.
NL Industries, Inc., 111 Broadway, New York, N.Y. 10006.
National Steel Corp., Grant Building, Pittsburgh, pa. 15219.
The Norton Co., One New Bond Street, Worcester, Mass. 01610.
Olin Corp. 120 Long Ridge Road. Stamford, Conn. 06904.
Owens-Corning Fiberglas Corp., 717 Fifth Avenue, New York, N.Y. 10022.
Owens-Illinois, Inc., Madison Avenue & St. Clair Street, Toledo, Ohio 43666.
Pacific Gas & Electric Co., 77 Beale Street, San Francisco, Calif. 94106.
Pacific Power & Light Co., Public Service Building, Portland, Oreg. 97204.
J. C. Penney Co., 1301 Avenue of the Americas, New York, N.Y. 10019.
Pennzoil United Inc., 900 Southwest Tower, Houston, Tex. 77002.
Phillips Petroleum Co., Phillips Building, Bartlesville, Okla. 74004.
PPG Industries, One Gateway Center, Pittsburgh, Pa. 15222.
Proctor & Gamble Co., P.O. Box 599, Cincinnati, Ohio 45202.
Public Service Co. of Colorado, P.O. Box 840, Denver, Colo.
Public Service Indiana, 1000 East Main Street, Plainfield, Ind. 46168.
Public Service Co. of Oklahoma, Box 201, Tulsa, Okla. 74102.
Public Service Electric & Gas, 80 Park Place, Newark, N.J. 07101.
Ralston Purina Co., Checkerboard Square, St. Louis, Mo. 63102.
RCA Corp., 30 Rockefeller Plaza, New York, N.Y. 10020.
Republic Steel Corp., Republic Building, Cleveland, Ohio 44101.
Reynolds Metals Co., 6601 Broad Street, Richmond, Va. 23229.
R. J. Reynolds Industries, Inc., Winston Salem, N.C. 27102.
Roadway Express, Inc., 1077 George Boulevard, Akron, Ohio 44309.
Rockwell International Corp., 600 Grant Street, Pittsburgh, Pa. 15219.
Rohr Industries, Inc., P.O. Box 878, Chula Visfa, Calif. 92012.
Scott Paper Co., Scott Plaza, Philadelphia, Pa. 19113.
Sears, Roebuck & Co., Sears Tower, Department 702, Chicago, Ill. 60684.
Shell Oil Co., P.O. Box 2463, Houston, Tex. 77001.
SIFCO Industries, Inc., 970 East 64th Street, Cleveland, Ohio 44103.
A. O. Smith Co., Milwaukee, Wis. 63216.
Southern California Edison Co., P.O. Box 800, Rosemead, Calif. 91770.
Southern Co., 64 Perimeter Center East, Atlanta, Ga. 33036.
Standard Oil Co. of Indiana, 200 East Randolph Drive, Chicago, Ill. 60601.
Stauffer Chemical Co., Westport, Conn. 06880.
Sundstrand Corp., 751 Harrison Avenue, Rockford, Ill. 61101.
TRW Inc., 23555 Euclid Avenue, Cleveland, Ohio 44117.
Tenneco, Inc., P.O. Box 2511, Houston, Tex. 77001.

Texaco, Inc., 135 East 42d Street, New York, N.Y. 10017.
Texas Gulf Sulphur Co., 200 Park Avenue, New York, N.Y. 10017.
Texas Instruments, Inc., P.O. Box 5474, Dallas, Tex. 75222.
Texas Power & Light Co., Fidelity Union Life Building, Dallas, Tex. 75201.
Trans World Airlines, 605 Third Avenue, New York, N.Y 10016.
Texas Gas Transmission Corp., 3800 Frederica Street, Owensboro, Ky. 42301.
Union Camp Corp., 1600 Valley Road, Wayne, N.J. 07470.
Union Carbide Corp., 270 Park Avenue, New York, N.Y. 10017.
Union Electric Co., P.O. Box 87, St. Louis, Mo. 63166.
Uniroyal, Inc., 1230 Avenue of the Americas, New York, N.Y. 10020.
United Aircraft Corp., 400 Main Street, East Hartford, Conn. 06108.
U.S. Steel Corp., 600 Grant Street, Pittsburgh, Pa. 15230.
Utah International Inc., 550 California Street, San Francisco, Calif. 94104.
Westinghouse Electric Corp., Gateway Center, Pittsburgh, Pa. 15222.
Weyerhaeuser Co., Tacoma Building, Tacoma, Wash. 98401.
Wheeling-Pittsburgh Steel Corp., P.O. Box 118, Pittsburgh, Pa. 15230.
Vernon E. Knudsen, White Motor Corp., 100 Erieview Plaza, Cleveland, Ohio 44114.
Zerox Corp., Stamford, Conn., 06904.

INLAND CONTAINER CORP.,
Indianapolis, Ind., June 30, 1975.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

MY DEAR SENATOR HART: I have carefully reviewed the provisions of this proposed legislation and am taking this opportunity to inform you of my views.

It is my opinion that the existing body of antitrust law adequately assures the existence of a continued competitive business environment, a principle, I might add, in which I firmly believe.

The proposed drastic revisions of certain of the present federal statutes are unwarranted, harsh and parts may prove to be, in fact, anti-competitive. It is inconceivable to me that Government continues to impose further restrictions on business which will make our capitalistic system even more non-competitive in world markets.

I respectfully urge that you consider the best interests of our country and vote against this proposed legislation.

Sincerely,

HENRY C. GOODRICH,
President.

[MAILGRAM]

OLIN CORP., *July 9, 1976.*

While we in the Olin Corporation oppose all substantive provisions of S. 1284 as unnecessary, we are particularly concerned with Titles II and IV.

The Justice Department already has very substantial investigatory powers, both compulsory through grand jury subpoenas and civil investigative demands and generally through fact-finding capabilities of its personnel, the FBI and other Government agencies. Title II would give the Department almost unlimited powers which would serve mostly to threaten individual and personal freedoms. There is nothing in our history since the Department was given civil investigative powers in 1962 to warrant such additional authority.

Title IV of the parens patriae theory is primarily a punitive measure which does not even pretend to equate actual injury to individuals to the damages sought. A concern which violates the antitrust laws, even unintentionally, is already faced with very substantial liabilities in the form of fines and of treble damage actions, both individual and class, which a State already has the ability to bring if damaged. To require such a concern to face 50 additional actions, each financed with taxpayers' money, is simply to punish the stockholders of that concern rather than the individuals who may have violated the law.

We earnestly urge you to drop any further consideration of S. 1284.

Thank you.

General Counsel.

JA 72

Gannett

DOUGLAS H. McCORKINDALE
Vice President
General Counsel and Secretary
55 Exchange St.
Rochester, NY 14614

October 29, 1975

Mr. Thomas B. Mechling
President
Public Equity Corporation
Box 361
Larchmont, New York 10538

Dear Tom:

I read in the recent issue of Automotive News an indication that your corporation is interested in buying a percent of the litigation now being pursued by attorney Carl Pierson. When you get a change, I would appreciate it if you could give me a call so that I could learn more about your motives and the background of your decision.

Regards.

Sincerely,

DHMcC:jld

Douglas H. McCorkindale

10/31 --

Dear Doug, the above is an indication of interest, not a commitment, for we have a long, hard pull until the March 31, 1976, "deadline date" to get the Public Equity issue subscribed. All best wishes. I've copied your letter to Attorney Carl Person if he wishes to add [illegible]

Tom Mechling

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

CARL E. PERSON,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

75 C 1473
MEMORANDUM and ORDER

- X

Appearances:

CARL E. PERSON, Esq., plaintiff pro se

HALIBURTON FALES, 2d Esq. (Messrs. WHITE & CASE and ROBERT H. HAILE, Esq., of Counsel) for The Association

DANIEL M. COHEN, Esq. (LOUIS J. LEFKOWITZ, Esq., Attorney General, of Counsel) for defendants other than the Bar Association, and for the Attorney General under Executive Law, § 71.

DOOLING, D.J.

Plaintiff has applied for the convening of a three judge court (28 U.S.C. § 2281) on the basis that the second count of the complaint challenges on constitutional grounds the validity of certain sections of the Judiciary Law of New York as implemented through the rules of the Appellate Divisions and the Lawyer's Code of Professional Responsibility.

FPI—SS—3-17-72—30M—9153

Broadly, plaintiff, a lawyer, contends that, as implemented and threatened to be applied, the statutes, rules and code stifle the prosecution and fair trial of litigation (such as antitrust triple damage cases) by making impossible the financing of such costly litigation. Plaintiff particularly points to the canons of professional conduct that, in substance, forbid the transfer for value of shares in the rights of action, and forbid the retention of expert witnesses whose compensation would be contingent on the success of the suit and would be measured upon the amount of the recovery.

The complaint names other courts and bar associations, bar association members, and clients of such members as coconspirators to the extent that they have joined in adopting or enforcing laws and rules

> "... which prohibit clients pursuing antitrust claims and/or their attorneys working on a contingent-fee basis from obtaining the money to pay the litigation expenses by selling a percentage of their respective interests in the antitrust claims to private or public investors and from employing expert witnesses to testify at the trial on a contingent-fee basis;"

Plaintiff as counsel is prosecuting a particular antitrust

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case which, it is alleged, has become so expensive that the plaintiffs in it cannot bear the expense of bringing it to trial and retaining experts to testify and to prepare necessary accounting, survey, statistical and economic studies. Plaintiff alleges that he plans to and would, but for the statutes, rules and canons which appear to forbid it, seek investors, by private or public offering, whose investments would finance the pending litigation in exchange for the investors' receiving interests in the claim that in the aggregate would not exceed 50% of the final recovery; it is contemplated that the investors would not acquire any right to control the litigation, render legal advice about it, or engage in the practice of the law in connection with the case.

Plaintiff alleges that defendants in such cases as antitrust cases usually can afford to and do retain experts to aid in their defense, that such experts are often drawn from firms of experts who have regularly served the defendants in the past, expect to serve them in future, and may, therefore, be supposed to be influenced as expert witnesses by those factors; plaintiff complains that, in contrast,

plaintiffs are not free to retain experts whose compensation will be based on the amount of the recovery if there is any; this, plaintiff complains, is a legally enforced disparity in treatment that transgresses constitutional rights.

Hence, plaintiff argues that the Court should declare invalid the laws that, as implemented and applied, impose these radical and discriminatory disparities in rights of access to the courts of justice and in the ability of the less affluent litigants to vindicate their rights of property, and, further, that the court should enjoin their enforcement by defendants.

The parties have argued, in the main, the quality of the constitutional arguments advanced, plaintiff contending that they are substantial, the defendants that they are too insubstantial to justify convening a court under 28 U.S.C. 2281. It can well be thought that no threat of execution or enforcement is present, and that the case is, rather, one in which plaintiff's plans are frustrated by legal uncertainties that require resolution by ruling or, if need be, by judicial declaration.

FPI—SS—3-17-72—30M—9153

While the briefs discuss champerty, maintenance and barratry, the discussion is wide of the mark and assumes rather than illuminates the points in issue. What is principally involved is the application of Judiciary Law § 90(2), vesting the state supreme court with "power and control" over lawyers and the practice of the law and authorizing the appellate divisions to censure, suspend from practice or disbar lawyers who are guilty of professional misconduct or conduct prejudicial to the administration of justice and/of the rules of several appellate divisions that define professional misconduct. The Appellate Division, First Department, defines such misconduct in its Rules § 603.2 as including violation of any Disciplinary Rule of the Code of Professional Responsibility as adopted by the State Bar Association effective January 1, 1970. Section 691.2 of the Second Department Rules is in the same language. Section 1022.17 of the Fourth Department rules similarly incorporates the Code of Professional Responsibility. Plaintiff emphasizes the incorporation from the Code, in this manner, of DR 2-103(D) (a lawyer may not help a person or organization that furnishes legal services to others to promote use of

the lawyer's services); DR 2-106(A) (a lawyer may not contract for or receive excessive fees); DR 2-107(A) (a lawyer may not divide fees with another lawyer unless done so with the client's assent and in proportion to services rendered and responsibility assumed); DR 3-101(A) (a lawyer is not to help a layman practice law); DR 3-102 (a lawyer is not to divide fees with a layman); DR 5-103(B) (a lawyer is not to advance or guarantee financial assistance to a litigant except to the extent of direct litigation expenses, and the client must remain liable for the expenses); DR 5-107 (C) (a lawyer may not practice in corporate or association form if nonlawyers own an interest in or are directors or officers of the entity or have the right to direct or control the lawyer's professional judgment); DR 7-109(C) (a lawyer may not pay, or acquiesce in the paying of, compensation to a witness contingent upon the content of his testimony or the outcome of the case, but may advance, guarantee, or acquiesce in the payment of a reasonable fee for the professional services of an expert witness). DR 5-103 provides that a lawyer shall not acquire a proprietary interest in the cause of action or subject

FBI-SS-3-15-72-2016-0183

matter of a litigation he is conducting for a client, but may acquire his lien for services under applicable law, and may contract for a reasonable contingent fee.

The disciplinary rules in part lead back to First Department Rules § 603.18 (Champerty and Maintenance) and an identical Second Department rule provision (Section 691.15). These rules in substance forbid (1) the lawyer's giving in his own or in anothers name, before or after suit, a promise of anything of value to anyone to induce the placing of a claim in his hands or in the hands of another for the purpose of suing on it or defending against it, and forbid (2) the lawyer's paying any expense of prosecuting or defending against the claim as a consideration for such retainer.

The Judiciary Law covers some of the same ground. Sections 479, 481, and 482 make it unlawful for anyone to solicit or procure through solicitation a retainer for an attorney or to make a business of doing so, and make it unlawful for hospital employees, policemen, court personnel, or bailbondsmen to communicate with an attorney to aid or abet him in soliciting legal business or in procuring through

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solicitation a retainer or other agreement to perform legal services, and make it unlawful for the attorney to employ anyone to solicit, or to aid or abet in soliciting legal business or a retainer. These acts are made misdemeanors by Section 485.

Section 488 is closer to the classic definition of champerty: the section forbids lawyers' buying or taking any interest by assignment in any sort of thing in action "with the intent and for the purpose of bringing an action thereon," and forbids lawyers' promising or giving a valuable consideration to anyone as an inducement to or in consideration for the placing in his hands (or another's) of a claim for the purpose of suing on it. Section 489 enacts that persons and partnerships engaged in the claim adjustment or collection business and corporations generally shall not buy or take any interest by assignment in anything in action, claim or demand "with the intent and for the purpose of bringing an action ... thereon."

It is not at once apparent that any transgression of statute or rule must occur if plaintiff's client transfers interests in the claim in suit as a means of obtaining money

to continue the suit to completion. The client has already put the claim in suit and engaged counsel of its own choosing. There is no suggestion that any voice in controlling the litigation would be given to the transferees of interests. Plaintiff alleges (as in paragraphs 14 and 17) that the transfer would embrace a corresponding share in plaintiff's contingent fee, but that, in substance, means only that plaintiff's original clients will pay plaintiff out of their share in the final recovery, and, presumably, that circumstance will enter into the client's calculations of what share of the claim he will sell and at what price.

At this juncture, leaving aside Disciplinary Rule DR 7-109C, there does not appear to be any threat of action to prevent partial assignments of the rights of action sued on, and there is no basis, simply for that reason, for seeking to enjoin state officers from enforcing statutes and rules of, at best, doubtful applicability and in advance of their infraction. Rather, the case is one in which no threat of interference could easily arise unless plaintiff had sought from the Committee on Ethics of the Bar Association

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and been denied a favorable opinion on the ethical propriety of his project. If that occurs, then consideration of the issues tendered here will have to be resumed, although it seems questionable that, quite apart from any constitutional issues and the question of the substantiality of any such issues, the threat of enforcement by state officers will be such as to bring the case within Section 2281.

The questions circling around Disciplinary Rule DR7-109C stand in a different light. To quote it in full - it is subsumed under Canon 7 which provides that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law" -

> "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
> 1. Expenses reasonably incurred by a witness in attending or testifying.
> 2. Reasonable compensation to a witness for his loss of time in attending or testifying.
> 3. A reasonable fee for the professional services of an expert witness."

The language of the rule literally means that the fee arrangement of an expert for his services in a litigation may not be

contingent on the outcome of the case no matter how reasonable in amount and how probable the outcome and whether or not counsel in the same case are authorized (under Disciplinary Rule DR 5-103A.2.) to receive a fee contingent on the outcome of the case. The rule must be related to a risk of false swearing, the fear of which may be enhanced by a recognition that much expert testimony is difficult, often inscrutable and, therefore, especially open to calculated distortion. A fairly old - and difficult - New York case, Wellington v. Kelly, 1881, 84 N.Y. 543, 548-549, dealing with an agreement to compensate a witness for the production of critical testimony, approved contingent payment on the ground that the witness had an interest in the outcome of the case in any event, saying

> "The mere fact that the agreement might furnish a temptation to Hill [the witness] to prevaricate, or furnish false testimony, does not, we think, stamp the agreement as illegal per se, and no illegal or improper intent on the part of any of the parties is disclosed by the evidence."

But generally the New York cases enunciate the rule of DR 7-109C very clearly. Matter of Schapiro, 1st Dept. 1911, 144 App.Div. 1, 128 N.Y. Supp. 852; Laffin v. Billington,

App. Term 1st, 1904, 86 N.Y.Supp. 267. The Restatement of the Law, Contracts, § 552(2) is precisely to the same effect, as are 14 Williston, Contracts (3rd ed. 1972) 879 (§ 1716) and 6A Corbin, Contracts 379 (§ 1430). And the same rule is followed in N.Y.City Bar Assoc. Opinions No. 213 (1932) and 76 (1927-28). Only Barnes v. Boatmen's Nat'l Bank of St. Louis, 1941, 348 Mo. 1032, 156 S.W.2d 597 has been turned up as a case looking the other way. See also the language in Alexander v. Watson, 4th Cir. 1942, 128 F.2d 627, 630; Ferroline Corp. v. General Airline & Film Corp., N.D. Ill. 1952, 107 F.Supp. 326, 344; aff'd., 7th Cir. 1953, 207 F.2d 912, 916. The Barnes Court's holding sufficiently appears from the following excerpt:

> "Of course, counsel representing the administratrices knew that they must produce evidence to combat the presumption of Hugh Thomasson's sanity; however, there is nothing in the letter requiring respondent to furnish evidence to prove any specified fact. Nor is there anything in the evidence tending to show that respondent's testimony and advice was not his honest opinion. As this point is being ruled on appellant's demurrer to the evidence, we are not at liberty to draw the inference that respondent's testimony was false because his fee was contingent upon the success of the litigation. If we did so, we would be compelled

> to infer that a party litigant's testimony was false because he is interested in the outcome of his litigation. We would also have to infer that all witnesses were guilty of perjury who were produced by an attorney trying a case on a contingent fee basis.
>
> "We therefore hold that a valid contract does not become invalid as against public policy because the respondent was to be paid for his services only on the contingency that the estate of Hugh Thomasson should be successful in its various litigations then pending."

In this state of the law it would appear unlikely in the extreme that plaintiff could hope to obtain a favorable ruling from the Committee on Ethics. Yet without a ruling of some sort it is all but certain that he could not obtain an expert on a contingent fee basis, and, even if he could do so, and went forward, he would risk disciplinary proceedings. Plaintiff is, then, so far as concerns DR 7-109C, in the classic declaratory judgment plaintiff's posture (28 U.S.C. 2201; cf. Aetna Life Ins. Co. v. Haworth, 1937, 300 U.S.227; Willing v. Chicago Auditorium Ass'n, 1927, 277 U.S. 274, 288-289, 291) unless his contentions are so insubstantial that they can be characterized as frivolous. The contention in essence is that the disciplinary rule, whether or not it

expresses a tradition in the law of contracts, is irrational and operates in such a manner as to discriminate against those who cannot afford expert testimony, and may tend to deny to the less affluent litigant (typically but not necessarily a plaintiff) access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious. The pungent comment of the Missouri court could well be thought to answer the claim of frivolity, and it might well be suggested that DR 7-109 C ignores the idea that an expert in ordinary expectation would not engage to misrepresent his opinion for a fee measured on the outcome of the case rather than decline to act in a case in which he did not in fact form an opinion favorable to the contention of the party seeking to engage his expertise. It is difficult to understand the basis on which a compensated expert could ever be heard as a witness if the ordinary expectation were that experts generally will distort or misrepresent their opinions for a fee. Contingency of payment might seem on analysis an irrelevancy: reasonableness might appear to be the touchstone and no less the touchstone for licit contingent fees than for fees payable in all events.

But again it is clear that the case is not one for an injunction within Section 2281, and is not a case for convening a three judge court.

It is, accordingly,

ORDERED that plaintiff's motion to convene a three judge court under 28 U.S.C. 2281 is in all respects denied.

Brooklyn, New York

March 24, 1976.

U. S. D. J.

FPI—SS—3-17-7[illegible]—3031—9153

Notice of Motion Dated April 2, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 88

CARL E. PERSON,	:	75 C 1473 (JFD)
Plaintiff,	:	NOTICE OF MOTION
-against-	:	
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	
Defendants.	:	

TO: MESSRS. WHITE & CASE
Attorneys for The Association of the Bar of the City of New York
14 Wall Street
New York, N.Y. 10005

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York, pro se and as attorney for all other defendants
By: Daniel M. Cohen, Esq., Assistant Attorney General of the State of New York
Two World Trade Center - 47th Floor
New York, N.Y. 10047

PLEASE TAKE NOTICE that, upon the annexed affidavit of Carl E. Person, sworn to April 2 , 1976, and all pleadings and proceedings herein, plaintiff will move this Court before Hon. John F. Dooling, in Courtroom 8 at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on April 12 , 1976, at 9:30 a.m. as soon thereafter as plaintiff and defendants' counsel can be heard, for an Order

(i) under Rule 15(a), F.R.Civ.P., granting leave for plaintiff to amend his complaint to add a request for a declaratory judgment under 28 U.S.C. § 2201 in substantially the form of Exhibit A to the supporting affidavit;

(ii) under Rule 56(a), F.R.Civ.P., assuming grant of the relief requested in ¶ (i) above, granting a summary judgment in favor of plaintiff and against each of the defendants on plaintiff's action for a declaratory judgment relating to validity and/or enforceability of Disciplinary Rule 7-109(C) declaring the rule invalid and unenforceable;

(iii) under Rule 21, F.R.Civ.P., assuming grant of the relief requested in ¶¶ (i) and (ii) above, severing such part of plaintiff's claims, as amended, relating to validity and/or enforceability of Disciplinary Rule 7-109(C);

(iv) designating the docket number of such severed claim to be 75 C 1473B and the docket number of the remaining claims as 75 C 1473A;

(v) under Rule 15(a), F.R.Civ.P., directing defendants not to serve or file an amended answer in absence of any showing of prejudice or need; and

(vi) granting such other and further relief as may be deemed just and proper.

Dated: New York, New York
April 2, 1976

Yours, etc.

Carl E. Person

Carl E. Person, pro se
132 Nassau Street
New York, N.Y. 10038

(212) 349-4616

Affidavit in Support of Motion for Summary Judgment and Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL E. PERSON,	:	75 C 1473 (JFD)
Plaintiff,	:	AFFIDAVIT IN SUPPORT
-against-	:	
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL E. PERSON, being duly sworn, deposes and says:

1. I am the plaintiff in this action, am fully familiar with all facts and prior proceedings, and make this affidavit in support of my motion for relief under Rules 15(a), 21, 56(a), F.R.Civ.P., and for other relief, as set forth in my Notice of Motion dated April 2 , 1976.

2. The facts upon which I claim that I am entitled to the relief requested are set forth in prior affidavits by me served and filed in this action, and are set forth below.

3. The first of 3 or 4 (non-bifurcated) trials in National Auto Brokers Corp., et al. v. General Motors Corporation, et al., 70 Civ. 5421 (S.D.N.Y.) is scheduled for September, 1976, which date looks firm. It is

essential, accordingly, that the claim of invalidity and unenforceability of DR 7-109(C) be severed and allowed to proceed separately if I and my clients are to have any possibility of obtaining a final judgment far enough in advance of trial to be able to arrange for experts to testify on a contingent basis, and to give them sufficient time to perform the work upon which they will base their expert testimony.

4. The amendments I seek to make to my complaint are contained in Exhibit A hereto.

5. Each of the statements of material fact made by me in ¶¶ 1-7, 10-11 and 15 of my annexed Statement Pursuant to Rule 9(g) of the General Rules is true, and the material facts set forth in the other paragraphs are shown by the record to involve no genuine issue.

6. Whereupon, I respectfully request that my motion be granted in its entirety.

/s/ Carl E. Person
Carl E. Person

Subscribed and sworn to before me
this 2nd day of April, 1976.

/s/ Bernard Wecker
Notary Public
Queens Co. No 41-4183920
Comm. Expires March 30, 1977

(Add at p. 22) COUNT 3 JA 92

(Action for a Declaratory Judgment)

Jurisdiction

53. Plaintiff repeats and realleges ¶ 47 of this complaint as the basis for jurisdiction of this court to hear count 3 of this complaint.

54. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

55. Plaintiff repeats and realleges each of the allegations contained in ¶¶ 1-46 and 48-52 above.

* * * * * *

(Add at p. 23) PRAYER

6. That a judgment be granted against each of the defendants under 28 U.S.C. § 2201 declaring that DR 7-109C is discriminatory, invalid and unenforceable.

(Change old ¶ 6 to ¶ 7 in amended complaint, at p. 23).

Statement Pursuant to Rule 9(g) of the General Rules

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 93

CARL E. PERSON,	:	75 C 1473 (JFD)
Plaintiff,	:	STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES
-against-	:	
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	
Defendants.	:	

This statement is submitted by plaintiff pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York. Plaintiff contends that as to the facts listed below there is no genuine issue to be tried:

1. Plaintiff is a resident of Queens County, New York, in the Eastern District of New York, and has his office for the practice of law in New York County, New York, in the Southern District of New York.

2. Plaintiff has been and is the attorney of record, working on a wholly contingent-fee basis, for his 10 clients, who are the plaintiffs in a major, highly complex antitrust action against General Motors Corporation and others (the "Nabcor Action").

3. The first of 3 or 4 trials in the Nabcor Action is scheduled to commence in September, 1976.

4. Plaintiff and his clients are in substantial, present need of locating and retaining experts to testify at, and to prepare necessary accounting, survey, statistical, economic and marketing studies for, each of the 3 or 4 trials anticipated in the Nabcor Action.

5. Plaintiff's clients are unable to pay the reasonable but substantial fees being asked by expert witnesses on a non-contingent basis to perform the work and give the testimony reasonably required of them to enable plaintiff to present his clients' side of the controversy in the Nabcor Action fairly and fully.

6. The defendants in the Nabcor Action can afford to, and have retained and used and plan to use during the trials, experts to aid in their defense, drawn from firms of experts who have regularly served the defendants in the past and can be expected to serve them in the future.

7. Plaintiff and his 10 clients have already failed to use expert witnesses needed by them in the Nabcor Action to perform work and give testimony because of DR 7-109C, which prohibits plaintiff from using expert witnesses on any kind of contingent basis.

8. Each of the defendants participates in enforcement of DR 7-109C and other rules and statutes applicable to plaintiff if he violates DR 7-109C, directly (by defendants other than the New York State Attorney General) and indirectly (by the New York State Attorney General, under his authority to enforce § 90(2) of the New York Judiciary Law).

9. DR 7-109C clearly prohibits plaintiff from using expert witnesses in the Nabcor Action on any kind of contingent-fee basis:

(i) no matter how reasonable in amount;

(ii) no matter how probable the outcome; and

(iii) whether or not counsel in the same case are authorized (under DR 5-103A.2) to receive a fee contingent on the outcome of the case.

10. Some arrangements by plaintiff and his clients with expert witnesses to pay them reasonable fees on a contingent basis are possible, but for DR 7-109C.

11. DR 7-109C unreasonably discriminates against plaintiff and his 10 clients in favor of the defendants in the Nabcor Action.

12. The defendants in this present action deny in their pleadings and during oral argument by counsel that DR 7-109C is invalid or unenforceable.

13. It is unlikely in the extreme that plaintiff could hope to obtain a favorable ruling from the Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York ("Ethics Committee") that plaintiff could use expert witnesses in the Nabcor Action on a contingent-fee basis without ethical impropriety.

14. Without a ruling of some sort by the Ethics Committee, it is all but certain that plaintiff could not obtain experts willing to work on a contingent-fee basis, because of DR 7-109C.

15. If plaintiff found expert witnesses and used them on a contingent-fee basis in the Nabeor Action he would risk disciplinary proceedings by each of the defendants, under DR 7-109C and court rules of the 1st and 2nd Departments of the Appellate Division of the New York Supreme Court and criminal or other proceedings under § 90(2) of the New York Judiciary Law.

16. DR 7-109C is irrational and operates to discriminate against those who cannot afford expert testimony and tends to deny to the less affluent litigant access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious.

17. There is an actual case or controversy between plaintiff and defendants under 28 U.S.C. § 2201, 42 U.S.C. § 1983 and the 1st and 14th Amendments to the United States Constitution.

18. The actions of defendants in adopting and/or enforcing DR 7-109C, directly or indirectly, constitute state action.

Dated: New York, New York
April 2, 1976

Respectfully submitted,

Carl E. Person

Carl E. Person, pro se
132 Nassau Street
New York, N.Y. 10038

(212) 349-4616

Affidavit of Robert G. Haile, Jr., in Opposition to Plaintiff's Motion for Summary Declaratory Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 97

- x

CARL E. PERSON,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, SUPREME COURT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

AFFIDAVIT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT G. HAILE, JR., being duly sworn, says:

1. I am a member of the Bar of this Court and am associated with the firm of White & Case, attorneys for defendant Association of the Bar of the City of New York ("Association of the Bar") in this action. I am familiar with the proceedings which have previously taken place in this matter.

2. This affidavit is submitted pursuant to General Rule 9(g) in opposition to plaintiff's motion for a summary declaratory judgment that Disciplinary Rule 7-109C is invalid.

3. It is the position of the Association of the Bar that plaintiff's Statement Pursuant To Rule 9(g) Of The General Rules, dated April 2, 1976 ("Statement"), fails to

allege sufficient facts to enable the Court to determine the legal issues on the merits.

4. In Paragraph 4 of the Statement plaintiff states that he and his clients "are in substantial, present need of locating and retaining experts to testify." It is unclear from this conclusory language the extent to which expert testimony is "needed" or whether plaintiff can proceed as well without it. The underlying basis for plaintiff's claims should be revealed.

5. In Paragraph 5 of the Statement plaintiff, again in conclusory language, states that his clients are unable to pay the fees being asked by expert witnesses on a non-contingent basis. The facts concerning the financial resources of plaintiff's clients are not set forth, nor are the facts concerning efforts to obtain an expert on a non-contingent basis, or the amount of the non-contingent fee requested.

6. In Paragraph 7 plaintiff states that he and his clients have "already failed to use experts needed by them in the Nabcor Action", again without presenting any underlying facts. It may be that plaintiff was unable to obtain expert testimony for reasons other than Disciplinary Rule 7-109C.

7. Paragraph 10 of the Statement is not a fact, but pure speculation. Plaintiff may not be able to obtain an expert in the Nabcor Action on a contingent fee basis.

8. Paragraphs 11 and 16 of the Statement are also conclusory and fail to state any underlying facts to support the contention that Disciplinary Rule 7-109C "unreasonably discriminates against plaintiff and his 10 clients in favor of the defendants in the Nabcor Action," and is "irrational."

9. In Paragraph 14 plaintiff states that "it is all but certain that plaintiff could not obtain experts willing to work on a contingent-fee basis, because of DR-7-109C." However, in order to avoid resolution of hypothetical questions, it is necessary for plaintiff to have an expert ready, willing and able to testify for a contingent fee, so that the only remaining bar to testifying is Disciplinary Rule 7-109C. To the same effect, Paragraph 17 incorrectly concludes that there is extant a "case or controversy."

Therefore, it is respectfully requested that plaintiff's motion for summary declaratory judgment be denied.

ROBERT G. HAILE, JR.

Sworn to before me this
12th day of April, 1976

Notary Public

My Commission Expires March 30, 1978

Supplemental Affidavit in Support of Motion for Summary Declaratory Judgment and Exhibits A Through G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 100

----------X

CARL E. PERSON, : 75 C 1473 (JFD)

Plaintiff, : SUPPLEMENTAL AFFIDAVIT

-against- :

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, :
APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, :
APPELLATE DIVISION, SECOND DEPARTMENT, SUPREME COURT, and :
ATTORNEY GENERAL OF NEW YORK STATE, :

Defendants. :

----------X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL E. PERSON, being duly sworn, deposes and says:

1. I am the plaintiff in this action, am fully familiar with all the facts stated herein and all prior proceedings, and make this supplemental affidavit in reply to the opposing affidavit of Robert G. Haile, Jr., Esq. and in further support of my motion for a summary declaratory judgment, and other relief.

2. An amended Statement under Rule 9(g) of the General Rules is annexed hereto, although affiant does not believe that Rule 9(g) requires so much factual detail. In any event, the Court has the authority to disregard any surplusage.

3. (Re ¶ 4 of Haile Aff't.) Expert testimony is needed in each of the 3-4 trials in the Nabcor Action to assist in proving:

(i) the extent of my clients' damages, i.e., their loss in earnings and loss in capital values of their business and property (economist);

(ii) the financial status of my clients' businesses during the relevant portions of 1966-1973, which requires that the expert review my clients' voluminous receipts, check books, cancelled checks and other original records (accountant);

(iii) that 2-3 year leases of new automobiles to certain types of customers are the functional equivalent, in the marketplace, of outright sales of the same new automobiles (sale-lease expert);

(iv) the share of the domestic market for retail sales of new automobiles which my clients would have achieved but for the alleged violations of law (marketing consultant);

(v) that the $25,000,000 in franchises offered by my clients would have been sold, in view of the fact that more than $1,000,000 in franchises were sold, to 250 franchisees, and for other reasons (franchising consultant);

(vi) the extent to which the franchise and new-car consuming public is misled by the Better Business Bureaus into believing that the Better Business Bureaus are governmental agencies, in violation of a New York statute (professional poll taker and statistician); and

(vii) other or additional experts, possibly.

It is affiant's professional opinion, as attorney for the 10 plaintiffs in the Nabcor Action, that such expert testimony is needed by my clients, to maximize their probabilities for, and extent of, recovery, and to offset the expert testimony anticipated to be offered by the defendants, who have considerable expertise in the automobile industry available to them (the defendants include GM, GMAC, Ford, Chrysler, American Motors, various franchised new-car dealers, a trade association of franchised new-car dealers, and Citibank, among others). Without use of such experts to testify, my clients and I would not be able to offer sufficient (or perhaps any) admissible

evidence on these matters. My clients are not necessarily going to qualify as experts with completely unchallengeable credentials (I'm being cautious hereto to avoid any embarrassing "admissions") in the fields described in subparagraphs (i) through (vii) above, and whether any of my clients would be permitted to testify as experts in any or all of these fields is problematical or too risky, in my professional opinion as their attorney. Also, expert testimony by my clients themselves would be impractical. Because of their interest as plaintiffs in the action, the jury could easily decide to reject their "expert" testimony as unprofessional (referring to their status as parties, as distinguished from having a reasonable contingent fee). From a strategic standpoint, an independent (non-party) expert paid on a reasonable contingent-fee basis, fully disclosed, would be better for my clients than (i) no expert testimony at all; or (ii) having my clients testify as experts, assuming (which is doubtful in some instances) that they could qualify as experts at all. Furthermore, my clients do not have the financial resources needed by them to do the research and report preparation necessary to prepare them to testify as experts and, as working persons, they do not have the available time to do the extensive preparation themselves (assuming they would have the ability to do so). Using an expert on a reasonable contingent-fee basis would be more practical, and his testimony would be more believable than a plaintiff testifying on his own behalf as an "expert witness". In my professional opinion, as attorney for the Nabcor plaintiffs, the concept of an expert witness virtually excludes a plaintiff from testifying on his own behalf as an alleged expert, at least in the minds of the jury. The defendants in the Nabcor Action can be expected to call their own expert witnesses; the four GM defendants (GM, GMAC and Messrs. Donner and Roche) have already retained, during the past 3 or more years of the action, the major accounting

firm Price, Waterhouse & Company (Philadelphia branch and, perhaps, the New York branch) to review, report on and testify as to all of Nabcor's financial records, and presumably the financial records of the 9 other plaintiffs in the Nabcor Action. Price, Waterhouse (through one of its partners or managers) has already testified as accounting experts in the Nabcor Action on behalf of the GM defendants during the evidentiary hearing in 1973 on the Nabcor plaintiffs' (unsuccessful) motion for a preliminary injunction. Because of the lack of funds, my clients and I were unable to offer our own expert testimony on the same matters (other than Nabcor's accountant at the time, Lawrence Spector, now of 1 East Penn Square, Philadelphia, Pa. 19107) who, without any review (with respect to the matters at issue) of the massive documentation of Nabcor's financial records and the records of Nabcor's affiliates (all of which records were made available to Price, Waterhouse through discovery), without any review of the summaries prepared by Price, Waterhouse (see ¶ 5 below), and without any preparation of opposing summaries for introduction into evidence on behalf of the Nabcor plaintiffs, testified for about 15 minutes based on schedules prepared by his firm for purposes other than the litigation. He was paid his normal accountant's fee, subsequent to his testimony, with no prior agreement as to amount or rate. Meanwhile, Nabcor got behind in payment of other fees to his firm, and Mr. Spector advised me about 1 year ago that his firm would perform no further work for Nabcor unless he got paid (back fees and fees for the new work, if any), which Nabcor has insufficient funds to pay. On April 15, 1976, Mr. Spector advised me that he would testify for Nabcor (and perform needed preparation) on a contingent-fee basis, if this were not prohibited by any rule. Mr. Spector is not a CPA and, therefore, is not a member of the American Institute of Certified Public Accountants ("AICPA"), discussed below. Mr. Spector said that he would be

willing to because of his knowledge of the work I have been performing on behalf of Nabcor and the other clients; also, he said that he would want to know more about the merits of the action and the probabilities of recovery, and that the amount and type of work required would have to be ascertained, and the contingent fee arrangement would have to be satisfactory. Mr. Spector has a staff of 6 employees, which may or may not be adequate to perform the required pre-testimony research and reporting. Mr. Spector is not familiar with many of the Nabcor records (1966 and several years thereafter, when another firm was Nabcor's accountant). Price, Waterhouse, on the other hand, had about 3-6 employees working around the clock for 3 days (because of a court order) making photocopies (using 2-3 copying machines) of Nabcor's voluminous financial records for 1966-1973. The amount of time spent by Price, Waterhouse to review and report on these Nabcor financial records (and the financial records of the other plaintiffs, presumably) has probably amounted to many thousands of hours. The total bill to GM must have amounted to more than $100,000. Defendant Bar Association's newly-elected President, Adrian W. DeWind, Esq. has access to the actual amount, as a senior partner in GM's law firm, Messrs. Paul, Weiss, Rifkind, Wharton & Garrison. And, therefore, the Bar Association is in a position (unlike plaintiff) to state, in an affidavit for filing in this action, any reasons why (in their opinion, if so held) that plaintiffs in the Nabcor Action do not need any of the expert witnesses described in ¶¶ (i) through (vii) above; and any of the Nabcor plaintiffs have the financial ability to pay the amounts needed to retain experts on a non-contingent basis.

4. (Re ¶ 5 of Haile Aff't.) My clients are unable to pay the fees being asked by expert witnesses. Dr. Plotkin, associated with one of the

most qualified consulting firms in the United States Arthur D. Little & Co. ("ADL"), of Boston, told me on May 22, 1975 that for ADL to agree to perform some of the expert services referred to in subparagrahs (i) through (vii) above would cost my clients about $50,000, and that the project would take about 2-3 calendar months, if ADL could "staff up" fully. Annexed hereto as Exhibit A is a copy of my letter to Arthur D. Little & Co., dated April 29, 1975, with exhibit (answer to Interrogatories 37-9), which shows my request for ADL's services as an expert witness in the Nabcor Action. ADL's fee for testimony would run at the rate of about $700 per day, according to Dr. Miller of ADL on April 29, 1975. Also, Dr. Plotkin said that a study would run at absolutely no less than $20,000.

5. (Re ¶ 5 of Haile Aff't.) Prior to commencement of the Nabcor Action, Nabcor agreed with the other 9 plaintiffs to finance the action, as franchisor (of 7 plaintiffs) and as the principal plaintiff (controlled by the other 2 plaintiffs). The arrangement was disclosed to and accepted by the Court. Nabcor and its two controlling shareholders (plaintiffs Frank Maiorana and Anthony Maiorana) are without any substantial funds at this time; Nabcor has no business operations at present; and Nabcor has an approximate $190,000 unsatisfied judgment against it, including accrued interest. In any event, the other 7 plaintiffs do not have the required funds to pay for these needed experts, amounting to a minimum of $150,000, on a non-contingent basis. (I am including in the group of plaintiffs the beneficiary of the estate of a deceased plaintiff.) Furthermore, each of these 7 plaintiffs (franchisees of Nabcor) has an exceedingly small interest in the outcome of the Nabcor Action, amounting to less than 1% or 2% each (after deduction of my contingent fee). (No agreements have been made as to any division of recovery among plaintiffs.) As a result,

none of these 7 plaintiffs could be expected, reasonably, to finance the action, even if any of them did have sufficient funds. The Court has already determined that Nabcor is in severe financial trouble, and for such reason (among others) denied Nabcor's motion to represent the members of various alleged classes of plaintiffs. See the opinion of Judge Thomas P. Griesa, dated April 5, 1974, which stated in part:

> "Another reason for denying class action treatment is that I find that there is insufficient assurance that plaintiffs will fairly and adequately protect the interests of the class of broker-franchisees, as required by Rule 23(a). * * * The fact that plaintiffs do not have the requisite financial and other ability to represent 42,000 persons does not necessarily mean that plaintiffs lack the ability to represent the 200 or 250 alleged members of its own organization. * * * (pp. 44-45)
>
> "The record also shows that Nabcor has been in weak financial condition for well over two years. For the nine months ending October 31, 1971 Nabcor had an operating loss of $82,000 on sales of $221,000 -- and a total loss, after extraordinary items, of $183,[illegible]. For the six months ending July 31, 1972 Nabcor had an operating loss of $87,000 and a total loss of $96,000 on sales of $216,000. As of July 31, 1972 Nabcor had a negative working balance of $212,000. As of March 8, 1973 Nabcor had a negative cash balance of $1,472.
>
> "Nabcor has not provided current figures. However, the record shows that a judgment for $150,000 was entered against Nabcor in December 1972 in an Ohio state court on a defaulted promissory note. This judgment came to light when certain defendants were served in November 1973 with an order of attachment issued by the Supreme Court, New York County." (p.51)

6. (Re ¶ 5 of Haile Aff't.) On April 25, 1975, affiant spoke for about 1/2 of an hour with Elmo Roper of The Elmo Roper Organization, Inc., 1 Park Avenue, New York, N.Y., the world-known polling organization. Affiant requested an estimate from Mr. Roper for his organization to perform a market analysis through sampling and to testify in the Nabcor Action as an expert witness on whether the sale and lease of new cars are functional equivalents. He said a "very approximate fee" would be

$40,000 to $60,000. Mr. Roper said the fee would include a 3,500 sample having about 1,000 new-car buyers, and that, in Mr. Roper's professional opinion, the sample would be a "valid basis" for making projections and for him to testify to such effect.

7. (Re ¶ 5 of Haile Aff't.) I have communicated with perhaps 7-8 other possible expert witnesses. Each of them gave me fee requirements ranging from about $130 to $500 per day and requied that their fees be paid during the days they prepared to testify (although the rate for preparation was often lower than for testimony). For the most part, my communications were made during April and May of 1975. The aggregate amount of fees for non-duplicative preparation and testimony in the fields listed in ¶ 3 (i) through (vii) above is no less than $150,000, conservatively, it appears to me at this time. My clients do not have such funds.

8. (Re ¶ 6 of Haile Aff't.) The Nabcor plaintiffs failed to use experts to prepare and to testify in opposition to the preparation and testimony by Price, Waterhouse during the 1973 evidentiary hearing. Price, Waterhouse performed a substantial amount of work prior to testifying, and introduced into evidence during the evidentiary hearing the following "summaries" compiled by Price, Waterhouse:

(a) "Nabcor Inc. - Summary of Nabcor Transactions with the Maioranas for the Period August 1, 1972 to March 8, 1973 (Unaudited) - Compiled for Paul, Weiss, Rifkind, Wharton & Garrison", a copy of which is annexed hereto as Exhibit B;

(b) "Nabcor Inc. - Summary of Nabcor Transactions with the Maioranas and the Subsidiaries - Pocono and Leisure for the Period August 1, 1972 to March 8, 1973 (Unaudited) - Compiled for Paul, Weiss, Rifkind, Wharton & Garrison", a copy of which is annexed hereto as Exhibit C;

(b) "Nabcor Inc. - Summary of Nabcor Cash Receipts and Disbursements for the Period August 1, 1972 to March 8, 1973 (Unaudited) - Compiled for Paul, Weiss, Rifkind, Wharton & Garrison", a copy of which is annexed hereto as Exhibit D; and

(d) "Nabcor Inc. - Summary of Loan, Intercompany and Maiorana Transactions for the Period December 19, 1972 to January 31, 1973 (Unaudited) - Compiled for Paul, Weiss, Rifkind, Wharton & Garrison", a copy of which is annexed hereto as Exhibit E.

These 4 prepared "summaries" were alleged to represent Nabcor's financial transactions with affiliates to offset Frank Maiorana's claim that he needed a preliminary injunction because the activities of GM and the other co-conspirators had caused Nabcor to get into a dire financial condition, and that if the injunction were not granted, Nabcor would go out of the new-car business (the injunction was denied and Nabcor did go out of the car business, immediately after the denial). To prove this dire financial condition, Frank Maiorana told the judge, in chambers, that he and his brother (Anthony) had recently put about $100,000 into Nabcor, which suddenly became the most important issue during the evidentiary hearing. Based on the Price, Waterhouse unaudited "summaries" described above (which Price, Waterhouse's partner or manager admitted under oath were not prepared in accordance with generally accepted accounting principles, and without the benefit of any offsetting "summaries" prepared by any expert for plaintiffs, the Court was led into believing that Frank Maiorana and Anthony Maiorana had not put as much as $100,000 into Nabcor or its subsidiaries (for whatever relevance that was supposed to have on plaintiffs' entitlement to an order enjoining GM from interfering with Nabcor's automobile brokerage system), and that the amount put in was substantially less than $100,000. A substantial part of the testimony during the hearing was whether as much as $100,000 was actually put into Nabcor, to save Nabcor. Frank Maiorana and Anthony Maiorana claimed that personal guarantees of Nabcor and Nabcor subsidiary

borrowings should be included in the amount; but Price, Waterhouse admittedly and conveniently failed to follow generally accepted accounting principles by not disclosing these personal guarantees in their "summaries" (carefully limiting their summaries to cash transactions). Only by having their own experts prepared to do the same amount of preparation of "summaries" (for a non-contingent fee) could the Nabcor plaintiffs have been able to offset the distortions presented as "evidence" by defendants' "experts". Without similar expert testimony to present plaintiffs' (meritorious) side, it is now quite clear to me that the Nabcor plaintiffs had little hope of prevailing on their motion. The courts have little time to try to unravel accounting differences, and have to rely upon expert testimony to a great extent, and without such expert preparation and testimony my clients had little hope to win on that financial issue, however relevant. As attorney for the Nabcor plaintiffs, I have concluded that to a great extent the 3-4 Nabcor trials coming up are going to be a battle of expert witnesses, and affiant and his clients must be prepared, to avoid further substantial prejudice to the Nabcor plaintiffs. If I had been able to retain an accounting firm to testify during the evidentiary hearing (which I wanted to do but knew the plaintiffs could not afford), the firm would have had to review and analyze voluminous documents of Nabcor and its subsidiaries and other, review the "summaries" of Price, Waterhouse, and prepare counter-summaries, at a cost my clients could not meet (as evidenced by the Court's opinion). In other words, my clients were so broke that they could not hire the experts needed to prove they were broke, which may be questionable as a system of justice. But this clearly points out the importance to affiant and his 10 clients of using expert witness in future hearings and trials.

9. (Re ¶ 6 of Haile Aff't.) During the past 2 years, when it became clear that the Nabcor Action was going to go to trial, I failed to retain any experts of the types described in ¶ 3 (i) through (vii) above, or any other experts for that matter, because of the dire financial condition of my clients. During this period, therefore, I have failed to retain and use experts needed by my clients in the Nabcor Action, in spite of Mr. Haile's challenge in ¶ 6 of his affidavit. Dr. Plotkin of ADL has advised me that, for ADL and Dr. Plotkin to prepare themselves properly to testify in the Nabcor Action, they would need 2-3 months as well as a sufficient staff (meaning adequate funding of the project - about $50,000). He would have to review the Nabcor financial records (and records of the other 9 plaintiffs), perform market tests and other analyses, make appropriate projections, prepare his reports, and otherwise prepare to testify at the 3-4 trials. The first trial is set for September, 1976, and there is barely enough time for affiant to find experts willing to prepare and testify on a contingent basis in each of the various areas; to arrive at the necessary contingent fee arrangements with them (after reviewing the merits of the Nabcor Action and prospects for recovery); to have them prepare; to supervise this preparation; and have the witness ready to testify at trial.

10. (Re ¶ 7 of Haile Aff't.) Mr. Seymour Siegel, principal of Siegel & Mendlowitz, P.C., 251 W. 57th Street, New York, N.Y. 10019, advised me on April 13, 1976 that the firm would be very willing to prepare to testify and to testify in the Nabcor Action for a reasonable contingent fee, provided that there was no rule (Bar Association or AICPA) which prohibited them from doing so. Mr. Siegel said that, before he could arrive at a specific fee agreement with me and my clients, his firm would have

to analyze the accounting work required, make estimates of the time to be devoted, and learn more about the zerits of the Nabcor Action and the plaintiffs' probabilities for recovery. Mr. Siegel advised me that his firm has done contingent-fee work previously, but not any expert testimony in litigation on a contingent-fee basis. I have retained this CPA firm over the past 4-5 years as my accountants and during 1969-1972 I sent various SEC clients of mine to the firm for required SEC accounting work in connection with proposed public offerings of securities by these various clients. Mr. Siegel is a member of the AICPA.

11. (Re ¶ 7 of Haile Aff't.) On December 12, 1974, David Pindar, Esq., counsel to the Ethics Committee of the American Institute of Certified Public Accountants ("AICPA"), located at 1211 Avenue of the Americas, New York, N.Y. 10036, advised me that the AICPA had, at that time, 111,000 members of the 145,000 CPA's in the country; and that the question of contingent fees for expert testimony by a CPA presented an ethical problem for CPA members of the AICPA because of a "conflict of interest", according to the Ethics Committee of the AICPA. An article in The Wall Street Journal edition of May 6, 1975 (at p. 35) (Exhibit F hereto), entitled "Steps Taken to Bar Contingent Fees Paid to Accountants", stated that there was a rule proposed by the AICPA under which:

> "it would become unethical for an accountant to serve as an expert witness or do litigation research for a contingent fee. According to the American Institute of Certified Public Accountants, the change is intended to buttress the accountant's independence by eliminating a possible bias in expert testimony.
>
> "'Our concern is that the accountant at all times be objective and not have a financial stake in the outcome,' said Donald Schneeman, the institute's general counsel. 'This (concept) is a very hard thing for lawyers to grasp,' he added.
>
> "Already there are howls of protest from the 'plaintiff's bar,' the lawyers who specialize in bringing shareholder suits against big corporations or their auditors. They say the ethics ruling would

deny them expert accounting witnesses because, in their view, it is impractical to bring class actions unless lawyers and their supporting experts work for contingent fees — a percentage of whatever damages they recover."

"In a class action, the plaintiff — a shareholder charging fraud, for instance — brings suit on behalf of all his fellow shareholders. * * * The class's lawyer works for a share of the recovery, a portion that typically runs 10% to 25%, subject to court approval.

* * *

"In recent years, literally hundreds of class actions have been brought against accounting firms. Accountants complain that they are pegged as the 'deepest pocket' — the most solvent would-be defendants when disgruntled investors are looking around for somebody to sue.

"The accountants' code of ethics already bars working for contingent fees, but it makes an exception for fees 'fixed by courts or other public authorities" (as well as for accountants representing clients in tax proceedings). The proposed ruling asserts that the exception for court-set fees wasn't meant for class actions. Rather, it applies only where an accountant, in effect, is working for the court itself, as in a bankruptcy reorganization. The ruling, approved last week by an institute committee, is being circulated for comment.

"Melvyn I. Weiss, a New York lawyer who has brought numerous class actions against accounting firms, denounced the proposal as 'a clear attempt to emasculate the ability of small stockholders to obtain a remedy' against auditors and their clients. It is obviously impractical, he said, for a plaintiff with a $5,000 individual claim to hire a first-rate accounting firm as expert witnesses. Currently, Mr. Weiss said, accounting experts typically get 10% to 20% of the fees awarded by the court. Only a handful of firms are willing to serve as experts for the plaintiff's side, he said."

It seems clear that the AICPA Rule (302) was adopted, in part at least, for the benefit of the major corporations served by the leading members of the AICPA (including Price, Waterhouse), the same major corporations who benefit from DR 7-109C. Rule 302 will probably be withdrawn by the AICPA if DR 7-109C is declared invalid. On April 14, 1976, Mr. Pindar advised me that Rule 302 of the Rules of Conduct of the Code of Professional Ethics of the AICPA would appear to prohibit members of the AICPA from testifying (as

...guished from preparing to testify) on a contingent-fee basis; that the ...osal referred to in The Wall Street Journal article has not been adopted as a formal rule; that the AICPA Rule 302 was based primarily on the Bar Association DR 7-109C; and that if the courts declared DR 7-109C invalid, the effect on the related AICPA rule would probably be material. Mr. Pindar did say that there was a good chance, in such event, that Rule 302 would be withdrawn or revised. He also said that, at the present time, accounting firms are being awarded professional fees on a contingent basis in connection with derivative suits (naming a "Katz" case as one example which came to his mind), and that this may be (but is not necessarily) permitted under AICPA Rule 302, which says that fees "fixed by the court" are not to be considered as contingent fees prohibited by Rule 302. Mr. Pindar says that it still is an ethical problem for CPA members (and perhaps non-members) under Rule 302 to the extent there is any contingent fee for testimony (as distinguished from preparation to testify), in spite of the present practice in some derivative suits. Also, Mr. Pindar stated he understood the merits of my argument that an accounting firm could have a conflict (with respect to testifying truthfully) to the extent it has a fixed overhead (such as a long-term lease) during the long run and could be in financial difficulty if a major client (such as GM) withdrew its business; however, Mr. Pindar said that he did not agree with my argument.

12. (Re ¶ 7 of Haile Aff't.) On April 14, 1976, Les Seplaki, PhD, professor and expert economist (see Exhibit G hereto, a copy of a letter from Dr. Seplaki to attorneys dated September 5, 1975) advised affiant that he would be willing to testify as an expert economist and do the necessary work in preparation for his testimony in the Nabcor Action, and other

antitrust actions, on a reasonable contingent-fee basis, depending on the merits of the case, the prospects for recovery, the work required, and the terms of the contingent-fee agreement. Also, he advised me that he has testifed several times as an expert during antitrust trials.

13. (Re ¶ 8 of Haile Aff't.) DR 7-109C discriminates unreasonably against plaintiff and his 10 clients because it permits experts with various substantial interests of a contingent nature to testify, but prohibits plaintiff and his 10 clients from retaining experts on a contingent basis, however, reasonable. See pp. 53-71 of plaintiff's Reply Memorandum dated February 24, 1976, particularly ¶¶ 6-13 at pp. 58-62, for the reasons why DR 7-109C is unreasonably discriminatory against plaintiff and his 10 clients, and is irrational. The evils of the contingencies permitted by DR 7-109C are equal to or greater than the evils of various reasonable contingent fees which plaintiff and his clients are prohibited from paying by DR 7-109C.

Carl E. Person

Subscribed and sworn to before me
this 15th day of April, 1976.

Notary Public

NOTARY PUBLIC
Qualified in Queens Co.
Certificate Filed in New York Co.
Commission Expires March 30, 1977

CARL E. PERSON
ATTORNEY AT LAW
132 NASSAU STREET
NEW YORK, N. Y. 10038

(212) 349-4616

THOMAS M. McMANUS

JA 115

April 29, 1975

Dr. Irwin Miller, Ph.D.
Arthur D. Little, Inc.
Acorn Park
Cambridge, MA 02140

Re: National Auto Brokers Corp. ("Nabcor") v. General Motors Corporation

Dear Dr. Miller:

It was a pleasure talking with you yesterday about the Nabcor action. You were quite quick to grasp what I had in mind.

In accordance with our conversation, I enclose a copy of the ANSWER TO INTERROGATORY NO. 1 by each of the 10 plaintiffs. Nabcor and its founders, Frank Maiorana and Anthony Maiorana, are the primary plaintiffs. The remaining plaintiffs are franchisees of Nabcor (including Dale Strimple, a principal of one of the 6 franchisees). You will see from the answers to Interrogatory No. 1 that the damages of the plaintiffs (particularly Nabcor, Frank Maiorana and Anthony Maiorana) are staggering. The task at hand is proving these damages.

Plaintiffs intend to prove the Nabcor distribution system would have had 8% of the overall domestic market for new automobiles manufactured by the Big 4. See copy of Nabcor's answers to Interrogatories 37, 38 and 39 enclosed herewith. If any additional facts are needed, on which to base expert testimony relating to market share, please advise.

The whole system had about 1,000 new-car sales from inception (1967 model year) through March, 1973, when Nabcor went out of the business (because of the Court's denial of Nabcor's request for a preliminary injunction). GM's counsel advises the Court that if GM is enjoined from its current practices, it would cause a substantial change for the entire industry (relating to the marketing of new cars at retail). Because of this threat to the present method of marketing new cars (manufacturers' franchise systems), Nabcor was not permitted to compete and the market share that it did obtain was a small fraction of what Nabcor could have obtained, if it had been allowed to compete. Of course, it is just this size of the anticipated market that we are going to have to prove. If you need additional "facts" (other than the facts set forth in answer to Interrogatories 37-39), please let me know, and I will check to see whether we will be able to offer evidence in such regard.

I look forward to talking with you again.

Sincerely,

Carl E. Person

Carl E. Person

CEP:hr
Encls.

P.S. Nabcor's cost was the franchised dealer's cost plus $25 and the dealer's preparation charge. The dealer kept the "2% holdback" paid to him by the factory at the end of the year. Thus, on a $3,000 car (wholesale price) the franchised dealer had a cost advantage of $85 (plus $15 advertising allowance paid to dealer as On sales to qualified leasing companies, dealers had a rebate in addit

Exhibit A

Interrogatory No. 37: Each fact supporting Plaintiffs' contention that by the date of the complaint Plaintiffs "would have achieved a sales level of approximately 8% of the entire market for new automobiles in the United States:

1. Fleet sales started only a few years before Nabcor's new system of marketing cars and over a relatively short period of time jumped to about 15% of the entire market;

2. Nabcor's organization of franchised dealers was comparable in contemplated numbers of personnel to the present structure of the automobile industry and would have had the capacity to far better than the 8% figure;

3. Nabcor's 20,000 contemplated Brokers (with help from the Master Brokers, Area Brokers and Nabcor itself) would have been able to sell at a maximum (easily) of about 200 cars per year or 50 cars per year for part-time Brokers. At the minimum of 50 cars per year (1 car per week) the 20,000 Brokers would have sold about 1,000,000 cars per year. Some Brokers would not have been operating for various reasons, which accounts for the reduction of sales from 10% of 10,000,000 to about 8%. The figures would allow Brokers to earn a decent living and the Brokers would have been able to compete successfully with the franchised dealers, who were stuck with higher costs.

4. Foreign cars achieved about 16% of the market.

5. Nabcor was selling all makes and models of domestic cars, at lower prices, with lower overhead, with less self-interest and with various other factors which would have allowed Nabcor and its franchisees to succeed in absence of the illegal activities alleged in the complaint.

6. Nabcor's rate of increase in car orders and franchise sales allow the conclusion that Nabcor would have achieved the 8% goal at a minimum.

7. Other auto brokers have been able to build substantial volumes of sales through the "bird-dog" system of auto brokerage.

8. The cost per order was very low;

9. The market for the new automobiles manufactured by GM, Ford, Chrysler and AMC was well established, and all Nabcor had to do to capture a sizeable percentage was offer the right price.

10. Nabcor planned a variety of other services to the new-car purchaser, including indirect financing through Nabcor Credit Corporation, insurance, warranty insurance or other warranty programs, sale of optional equipment; etc.

Interrogatory No. 38: Each fact supporting allegation that by the date of the complaint Plaintiffs "would have achieved used automobile sales amounting to about 60% of the number of new automobiles sold through the Nabcor System":

1. Franchised dealers averaged about 60 used car transactions (trade-in and resale) for each 100 new-car sales, a conservative estimate.

2. Nabcor would have been able to do as well as franchised dealers in accepting trade-ins and reselling them.

Interrogatory No. 39: Each fact supporting allegation that by the date of the complaint Plaintiffs "would have derived substantial additional income from related financing and insurance arrangements":

1. Nabcor actively sought indirect financing and was able to get one back to provide a small amount;

2. Nabcor set up Nabcor Credit Corporation, applied for a license, and intended to provide customer financing as well as insurance, and warranty insurance as well;

3. Franchised dealers obtain benefits from indirect financing, insurance, etc. and Nabcor should have been able to do as well as franchised dealers in these respects, probably better on a volume basis or with captive companies.

BEST COPY AVAILABLE

N A B C O R I N C.

SUMMARY OF NABCOR TRANSACTIONS WITH THE MAIORANAS

FOR THE PERIOD
AUGUST 1, 1972 TO MARCH 8, 1973
(Unaudited)

Compiled for

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

rice
aterhouse & Co.

Exhibit B

N A B C O R I N C.

SUMMARY OF NABCOR TRANSACTIONS WITH THE MAIORANAS

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

Loan account	Total	Frank	Anthony
Balance at July 31, 1972 owed by Nabcor to the Maioranas	$16,918	$16,918	
Loans made by the Maioranas to Nabcor	23,652	23,652	
Repayments of loans by Nabcor to the Maioranas (Notes 1, 2 and 3)	(53,490)	(45,390)	($ 8,100)
Balance at March 8, 1973 owed by the Maioranas to Nabcor	($12,920)	($ 4,820)	($ 8,100)
Salary payments to the Maioranas during period August 1, 1972 to March 8, 1973	$22,728	$12,652	$10,076

NABCOR INC.

DETAIL OF NABCOR TRANSACTIONS WITH THE MAIORANAS

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

Loan account	Total	Frank	Anthony
Balance at July 31, 1972 owed by Nabcor to the Maioranas	$16,918	$16,918	
Loans made by the Maioranas to Nabcor:			
August 14, 1972	1,200	1,200	
August 14, 1972	2,000	2,000	
August 24, 1972 (paid to Ray LaVigne)	200	200	
October 12, 1972	100	100	
October 30, 1972	2,300	2,300	
November 24, 1972	3,116	3,116	
January 5, 1972	11,736	11,736	
February 13, 1972	3,000	3,000	
	23,652	23,652	
Repayments of loans by Nabcor to the Maioranas (Note 1):			
August 3, 1972	(2,000)	(2,000)	
October 13, 1972	(1,000)	(1,000)	
October 19, 1972	(2,000)		($ 2,000)
December 19, 1972	(25,915)	(21,915)	(4,000)
December 19, 1972 (Note 2)	(3,700)	(1,600)	(2,100)
January 2, 1973	(11,875)	(11,875)	
January 2, 1973 (Note 3)	(7,000)	(7,000)	
	(53,490)	(45,390)	(8,100)
Balance at March 8, 1973 owed by the Maioranas to Nabcor	($12,920)	($ 4,820)	($ 8,100)
Salary payments during period August 1, 1972 to March 8, 1973:			
December 19, 1972	$17,500	$10,000	$ 7,500
December 26, 1972	500		500
February 23, 1973	4,202	2,357	1,845
March 2, 1973	526	295	231
	$22,728	$12,652	$10,076

N A B C O R I N C.

NOTES TO THE SUMMARY OF NABCOR TRANSACTIONS WITH THE MAIORANAS

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

NOTE 1 - REPAYMENT OF LOANS BY NABCOR TO THE MAIORANAS:

Repayments and other charges to the Maiorana loan accounts were made for $12,920 more than owed to them by Nabcor.

NOTE 2 - DECEMBER 19, 1972 CHARGE TO LOAN ACCOUNT:

In discussing the $55,000 loan, during the deposition taken on March 29, 1973 (page 763), Frank Maiorana stated that $2,100 and $1,600 were used directly by Anthony Maiorana and himself to satisfy certain personal obligations. These amounts were not recorded in the loan accounts in the general ledger but are included in this analysis.

NOTE 3 - JANUARY 2, 1973 CHARGE TO LOAN ACCOUNT:

Frank Maiorana, in a deposition taken on March 29, 1973 (page 808), stated that land he purchased from Nabcor was partially financed by the extinguishment of $7,000 owed to him. This amount is not recorded in the loan account of the general ledger, but is included in this analysis.

Price Waterhouse & Co.

SIXTY BROAD STREET, NEW YORK, NEW YORK 10004 · 212-422-6000

April 6, 1973

To Paul, Weiss, Rifkind, Wharton & Garrison

At your request we have compiled an unaudited summary of Nabcor transactions with the Maioranas for the period August 1, 1972 to March 8, 1973 from photocopies of what is purported to be the financial records of Nabcor Inc., consisting of the general ledger, for the period August 1, 1972 to January 31, 1973 and the cash receipts and cash disbursements journals for the period August 1, 1972 to March 8, 1973, which were marked as deposition exhibits "Anthony Maiorana Exhibits 3, 4, 5, and 6" and "Frank Maiorana Exhibits 22 and 26" in the action of National Auto Brokers Corp., et al., plaintiffs, against General Motors Corporation, et al., defendants. Inasmuch as we have not made independent verification of these records this compilation does not constitute an examination in accordance with generally accepted auditing standards and accordingly we express no opinion on the fairness of the amounts included therein.

Our work consisted of the following for the period August 1, 1972 to January 31, 1973:

1. We added the individual account balances in the general ledger to determine if the general ledger balanced. The debits exceeded the credits by $1,346. Due to the insignificance of this amount and the lack of supporting documentation, we did not attempt to locate this difference.
2. We checked the arithmetic of all the balances in the general ledger.
3. We checked the arithmetic of the cash receipts and cash disbursement journals and agreed the monthly totals to the cash accounts in the general ledger.
4. We agreed the monthly distribution of cash from the receipts journal to the individual general ledger accounts.
5. We agreed the monthly distribution of cash from the disbursements journal to the general ledger accounts, except that in September, October, November, December and January we noted unlocated differences of $180, $399, ($397), $821, and $490, respectively.
6. We reflected the results of two Maiorana transactions occurring on December 19, 1972 and January 2, 1973 as stated in a deposition of Frank Maiorana taken on March 29, 1973 (pages 763 and 808). These two transactions are described in Notes 2 and 3 to this compilation.

The information for the period from February 1, 1973 to March 8, 1973 was compiled from photocopies of the cash receipts and cash disbursements journals for that period. No general ledger was presented for our review and accordingly we were unable to trace the cash receipts and cash disbursements totals to a general ledger cash account.

This compilation was made for the sole use of General Motors Corporation in the action of National Auto Brokers Corp., et al., against General Motors Corporation, et al.

Price Waterhouse

N A B C O R I N C.

SUMMARY OF NABCOR TRANSACTIONS WITH THE MAIORANAS AND THE SUBSIDIARIES - POCONO AND LEISURE

FOR THE PERIOD
AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

Compiled for

PAUL WEISS, RIFKIND, WHARTON & GARRISON

rice
aterhouse & Co.

Exhibit C

N A B C O R I N C.

SUMMARY OF NABCOR TRANSACTIONS WITH THE MAIORANAS AND THE SUBSIDIARIES - POCONO AND LEISURE

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

	Total	Maioranas	Pocono and Leisure
Balance at July 31, 1972 owed by Nabcor to the Maioranas and Pocono and Leisure	$18,118	$16,918	$ 1,200
Loans made by the Maioranas and Pocono and Leisure to Nabcor	70,243	23,652	46,591
Repayments of loans by Nabcor Inc. to the Maioranas and Pocono and Leisure (Notes 1, 2 and 3)	(97,684)	(53,490)	(44,194)
Balance at March 8, 1973 owed by Nabcor to Pocono and Leisure, and by the Maioranas to Nabcor	($ 9,323)	($12,920)	$ 3,597

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		Totals
Balance at July 31, 1972 owed by Nabcor to the Maioranas and Pocono and Leisure		$18,118
Loans made by the Maioranas and Pocono and Leisure to Nabcor:		
August 14, 1972		12,200
August 14, 1972		2,000
August 24, 1972	(paid to Ray LaVigne)	200
September 27, 1972		10
October 5, 1972		2,000
October 12, 1972		100
October 30, 1972		2,300
November 14, 1972		13,414
November 24, 1972		3,116
December 19, 1972		2,500
January 5, 1973		11,736
January 14, 1973		700
January 19, 1973		400
January 26, 1973		5,000
February 13, 1973		3,967
February 22, 1973		1,000
February 23, 1973		5,000
February 27, 1973		2,600
March 7, 1973		2,000
		70,243
Repayments of loans by Nabcor to the Maioranas and Pocono and Leisure (Note 1):		
August 3, 1972		(2,000
August 14, 1972		(9,293
October 13, 1972		(1,000
October 13, 1972		(1,000
October 19, 1972		(2,000
November 14, 1972		(5,399
November 14, 1972		(1,178
December 19, 1972		(25,915
December 19, 1972	(Note 2)	(3,700
December 22, 1972		(750
December 28, 1972		(1,329
December 29, 1972		(265
January 4, 1973		(36,266
January 4, 1973	(Note 3)	(7,000
February 9, 1973		(329
March 6, 1973		(260
		(97,684
Balance at March 8, 1973 owed by Nabcor to Pocono and Leisure, and by the Maioranas to Nabcor		($ 9,323

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:SACTIONS WITH MAIORANAS AND
:S POCONO AND LEISURE

: 1, 1972 TO MARCH 8, 1973

udited)

Maioranas			Pocono and Leisure		
Total	Frank	Anthony	Total	Pocono	Leisure
$16,918	$16,918		$ 1,200	$ 1,200	
1,200	1,200		11,000		$11,000
2,000	2,000				
200	200				
			10		10
			2,000		2,000
100	100				
2,300	2,300				
			13,414	13,414	
3,116	3,116				
			2,500	2,500	
11,736	11,736				
			700		700
			400	400	
			5,000		5,000
3,000	3,000		967	967	
			1,000	1,000	
			5,000	3,500	1,500
			2,600	2,600	
			2,000	1,500	500
23,652	23,652		46,591	25,881	20,710
(2,000)	(2,000)				
			(9,293)	(3,000)	(6,293)
			(1,000)		(1,000)
(1,000)	(1,000)				
(2,000)		($2,000)			
			(5,399)	(5,399)	
			(1,178)	(1,178)	
(25,915)	(21,915)	(4,000)			
(3,700)	(1,600)	(2,100)			
			(750)		(750)
			(1,329)	(329)	(1,000)
			(265)	(265)	
(11,875)	(11,875)		(24,391)	(11,540)	(12,851)
(7,000)	(7,000)				
			(329)	(329)	
			(260)	(260)	
(53,490)	(45,390)	(8,100)	(44,194)	(22,300)	(21,894)
($12,920)	($ 4,820)	($8,100)	$ 3,597	$ 4,781	($ 1,184)

N A B C O R I N C

NOTES TO THE SUMMARY OF NABCOR TRANSACTIONS WITH THE MAIORANAS AND THE SUBSIDIARIES - POCONO AND LEISURE

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

NOTE 1 - REPAYMENT OF LOANS BY NABCOR TO THE MAIORANAS:

Repayments and other charges to the Maiorana loan accounts were made for $12,920 more than owned to them by Nabcor.

NOTE 2 - DECEMBER 19, 1972 CHARGE TO LOAN ACCOUNT:

In discussing the $55,000 loan, during the deposition taken on March 29, 1973 (page 763), Frank Maiorana stated that $2,100 and $1,600 were used directly by Anthony Maiorana and himself to satisfy certain personal obligations. These amounts were not recorded in the loan accounts in the general ledger but are included in this analysis.

NOTE 3 - JANUARY 2, 1973 CHARGE TO LOAN ACCOUNT:

Frank Maiorana, in a deposition taken on March 29, 1973 (page 808), stated that land he purchased from Nabcor was partially financed by the extinguishment of ,000 owed to him. This amount is not recorded in the loan account the general ledger, but is included in this analysis.

Price Waterhouse & Co.

SIXTY BROAD STREET, NEW YORK, NEW YORK 10004 · 212-422-6000

April 6, 1973

To Paul, Weiss, Rifkind, Wharton & Garrison

At your request we have compiled an unaudited summary of Nabcor transactions with the Maioranas and the subsidiaries, Pocono and Leisure, for the period August 1, 1972 to March 8, 1973 from photocopies of what is purported to be the financial records of Nabcor Inc., consisting of the general ledger for the period August 1, 1972 to January 31, 1973 and the cash receipts and cash disbursements journals for the period August 1, 1972 to March 8, 1973, which were marked as deposition exhibits "Anthony Maiorana Exhibits 3, 4, 5, and 6" and "Frank Maiorana Exhibits 22 and 26" in the action of National Auto Brokers Corp., et al., plaintiffs, against General Motors Corporation, et al., defendants. Inasmuch as we have not made independent verification of these records this compilation does not constitute an examination in accordance with generally accepted auditing standards and accordingly we express no opinion on the fairness of the amounts included therein.

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1. We added the individual account balances in the general ledger to determine if the general ledger balanced. The debits exceeded the credits by $1,346. Due to the insignificance of this amount and the lack of supporting documentation, we did not attempt to locate this difference.
2. We checked the arithmetic of all the balances in the general ledger.
3. We checked the arithmetic of the cash receipts and cash disbursement journals and agreed the monthly totals to the cash accounts in the general ledger.
4. We agreed the monthly distribution of cash from the receipts journal to the individual general ledger accounts.
5. We agreed the monthly distribution of cash from the disbursements journal to the general ledger accounts, except that in September, October, November, December and January we noted unlocated differences of $180, $399, ($397), $821, and $490, respectively.
6. We reflected the results of two Maiorana transactions occurring on December 19, 1972 and January 2, 1973 as stated in a deposition of Frank Maiorana taken on March 29, 1973 (pages 763 and 808). These two transactions are described in Notes 2 and 3 to this compilation.

The information for the period from February 1, 1973 to March 8, 1973 was compiled from photocopies of the cash receipts and cash disbursements journals for that period. No general ledger was presented for our review and accordingly we were unable to trace the cash receipts and cash disbursements totals to a general ledger cash account.

This compilation was made for the sole use of General Motors Corporation in the action of National Auto Brokers Corp., et al., against General Motors Corporation, et al.

Price Waterhouse

N A B C O R I N C.

SUMMARY OF NABCOR CASH RECEIPTS AND DISBURSEMENTS

FOR THE PERIOD
AUGUST 1, 1972 TO MARCH 8, 1973
(Unaudited)

Compiled for

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

rice
aterhouse & Co.

Exhibit D

N A B C O R I N C.

SUMMARY OF NABCOR CASH RECEIPTS AND DISBURSEMENTS

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

Cash receipts, excluding those from the Maioranas and known transactions unrelated to the auto business		$98,801
Less - Cash disbursements, excluding those to the Maioranas and known transactions unrelated to the auto business		(52,371)
Excess of cash receipts over disbursements, as defined		46,430
Transactions with the Maioranas:		
Repayments to the Maioranas	($42,790)	
Salaries to the Maioranas	(22,728)	
Total payments to the Maioranas	(65,518)	
Less - Loans from the Maioranas	23,652	
Net payments to the Maioranas		(41,866)
Transactions with Pocono and Leisure:		
Received from Pocono and Leisure	46,591	
Payments to Pocono and Leisure	(44,194)	
Net receipts from Pocono and Leisure		2,397
Other transactions not related to the auto business (net)		(10,694)
Excess of cash disbursements over cash receipts		(3,733)
Cash balance at August 1, 1972		2,261
Cash balance at March 8, 1973		($ 1,472)

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Cash receipts, excluding those from the Maioranas and known transactions unrelated to the auto business:	
Vehicle sales (net)	$ 181
Franchise sales (net)	1,095
Bank loans	
Miscellaneous	
	1,276
Cash disbursements, excluding those to the Maioranas and known transactions unrelated to the auto business:	
Auto purchases	
Auto expenses	20
Legal and accounting	505
Commissions	
Salaries	1,546
Operating expenses	205
Bank loan payments	
Interest	
Unlocated difference	
	2,276
Excess (deficit) of cash receipts over cash disbursements excluding transactions with the Maioranas and known transactions unrelated to the auto business	(1,000)
Maiorana transactions:	
Loans from Maioranas	3,400
Repayments to the Maioranas (Note 1)	(2,000)
Maioranas salaries	
Net payments from (to) the Maioranas	1,400
Loans from (to) Pocono and Leisure (net)	1,707
Other transactions not related to the auto business:	
Transactions with North American Land	(1,450)
Lot sales	
Land purchases	
Payments to Ray LaVigne (Note 4)	
Investments (Note 2)	(1,200)
Property tax payments (Note 3)	
	457
Excess (deficit) of cash receipts over cash disbursements	(543)
Cash balances, beginning of period	2,261
Cash balances, end of period	$1,718

O R I N C.

OF NABCOR CASH RECEIPTS
ND DISBURSEMENTS

PERIOD AUGUST 1, 1972
MARCH 8, 1973

(Unaudited)

JA 134

E	September	October	November	December	January	February	March	Total
L	$ 1,964	$7,866	$ 300	$ 270	$11,323	$ 1,154		$23,058
)	795	645			1,500	350	($ 173)	4,212
				45,620	25,000			70,620
		760			79		72	911
)	2,759	9,271	300	45,890	37,902	1,504	(101)	98,801
					3,528	8,069		11,597
)	759	3,387		65	2,664	1,470		8,365
)	225	600	1,582	1,650	1,960	1,084		7,606
	119	119				84		322
)	331	661	661	826	1,130	1,497	399	7,051
)	265	4,562	1,039	3,068	1,348	2,140	486	13,113
					1,222	1,222		2,444
						380		380
	180	399	(397)	821	490			1,493
)	1,879	9,728	2,885	6,430	12,342	15,946	885	52,371
)	880	(457)	(2,585)	39,460	25,560	(14,442)	(986)	46,430
)		2,400	3,116		11,736	3,000		23,652
)		(3,000)		(25,915)	(11,875)			(42,790)
				(18,000)		(4,202)	(526)	(22,728)
)		(600)	3,116	(43,915)	(139)	(1,202)	(526)	(41,866)
/	10	1,000	6,837	156	(18,291)	9,238	1,740	2,397
)	(14,694)	(1,150)						(17,294)
	42,016							42,016
					5,000			5,000
		(400)	(2,000)	(1,500)	(1,200)	(1,600)	(400)	(7,100)
)	(28,000)				(1,000)			(30,200)
			(3,116)					(3,116)
/	(668)	(1,150)	4,837	(45,259)	(15,630)	6,436	814	(50,163)
)	212	(1,607)	2,252	(5,799)	9,930	(8,006)	(172)	(3,733)
	1,718	1,930	323	2,575	(3,224)	6,706	(1,300)	2,261
)	$ 1,930	$ 323	$2,575	($ 3,224)	$ 6,706	($ 1,300)	($1,472)	($ 1,472)

N A B C O R I N C.

NOTES TO THE SUMMARY OF NABCOR CASH RECEIPTS AND DISBURSEMENTS

FOR THE PERIOD AUGUST 1, 1972 TO MARCH 8, 1973

(Unaudited)

NOTE 1 - REPAYMENTS OF LOANS TO MAIORANAS:

Repayments to the Maioranas were made for $2,220 more than owed to them by Nabcor. This amount excludes $10,700 of charges to the Maiorana loan accounts, which Frank Maiorana stated in a deposition taken March 29, 1973 (pages 763 and 808) should have been made.

NOTE 2 - INVESTMENTS:

Disbursements charged to the investments account consist of:

August	14, 1972	Disbursements made to "Ray LaVigne's Mother"	$ 1,200
September	29, 1972	Payments for Aleeda Development Corp.	28,000
January	15, 1973	Disbursement paid to "G.E. Credit Corp."	1,000
			$30,200

NOTE 3 - PROPERTY TAX PAYMENTS:

This represents a disbursement made to Joseph Notarianni on November 24, 1972 for the tax on the Giombetti Property.

NOTE 4 - PAYMENTS TO RAY LaVIGNE:

Frank Maiorana, in a deposition taken on March 15, 1973 (pages 359 - 360), stated that Ray LaVigne has never engaged in any functions relating to the auto business.

Price Waterhouse & Co.

SIXTY BROAD STREET, NEW YORK, NEW YORK 10004 212-422-60

April 6, 1973

To Paul, Weiss, Rifkind, Wharton & Garrison

At your request we have compiled an unaudited summary of Nabcor cash receipts and disbursements for the period August 1, 1972 to March 8, 1973 from photocopies of what is purported to be the financial records of Nabcor Inc., consisting of the general ledger for the period August 1, 1972 to January 31, 1973 and the cash receipts and cash disbursements journals for the period August 1, 1972 to March 8, 1973, whicl were marked as deposition exhibits "Anthony Maiorana Exhibits 3, 4, 5, and 6" and "Frank Maiorana Exhibits 22 and 26" in the action of National Auto Brokers Corp., et al., plaintiffs, against General Motors Corporation, et al., defendants. Inasmuch as we have not made independent verification of these records this compilation does not constitute an examination in accordance with generally accepted auditing standards and accordingly we express no opinion on the fairness of the amounts included therein.

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3. We checked the arithmetic of the cash receipts and cash disbursement journals and agreed the monthly totals to the cash accounts in the general ledger.
4. We agreed the monthly distribution of cash from the receipts journal to the individual general ledger accounts.
5. We agreed the monthly distribution of cash from the disbursements journal to the general ledger accounts, except that in September, October, November, December and January we noted unlocated differences of $180, $399, ($397), $821, and $490, respectively.
6. We summarized, on a monthly basis, entries made in the general ledger.
7. We added the balances in the cash accounts shown in the general ledger and at the end of each of the months from July 31, 1972 through January 31, 1973 to arrive at the total balance for all cash accounts in the general ledger.

The information for the period from February 1, 1973 to March 8, 1973 was compiled from photocopies of the cash receipts and cash disbursements journals for that period. No general ledger was presented for our review and accordingly we were unable to trace the cash receipts and cash disbursements totals to a general ledger cash account.

This compilation was made for the sole use of General Motors Corporation in the action of National Auto Brokers Corp., et al., against General Motors Corporation, et al.

Price Waterhouse

N A B C O R I N C.

SUMMARY OF LOAN, INTERCOMPANY AND MAIORANA TRANSACTIONS

FOR THE PERIOD DECEMBER 19, 1972
TO JANUARY 31, 1973

(Unaudited)

Compiled for

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

Price Waterhouse & Co.

Exhibit E

N A B C O R I N C.

SUMMARY OF LOAN, INTERCOMPANY AND MAIORANA TRANSACTIONS

FOR THE PERIOD DECEMBER 19, 1972 TO JANUARY 31, 1973

(Unaudited)

Total outside loans		$95,620
Less - Payments to Maioranas:		
Loans (net)	$26,053	
Salaries	53,004	
		79,057
Available for operations		$16,563
Net distribution of outside loans:		
Nabcor		$ 8,276
Pocono		5,721
Leisure		2,566
		$16,563

N A B C O R I N C.

SUMMARY OF LOAN, INTERCOMPANY AND MAIORANA TRANSACTIONS

FOR THE PERIOD DECEMBER 19, 1972 TO JANUARY 31, 1973

(Unaudited)

Transaction	Nabcor	Pocono	Leisure	Combined 3 companies
December 19, 1972:-				
Proceeds of loan (Fidelity)	$45,620.00			$45,620.00
Payments to:				
Frank Maiorana	(31,915.00)			(31,915.00)
Anthony Maiorana	(12,000.00)*			(12,000.00)
	1,705.00			1,705.00
January 2, 1973:-				
Proceeds of loan (Provident)	25,000.00			25,000.00
Payments to				
Frank Maiorana	(11,874.71)			(11,874.71)
Transfers to:				
Pocono	(11,539.90)	$11,539.90		
Leisure	(12,851.39)		$12,851.39	
January 5, 1973:-				
Payments to:				
Frank Maiorana		(6,000.00)	(7,000.00)	(13,000.00)
Anthony Maiorana		(5,000.00)	(5,000.00)	(10,000.00)
Loan from Frank Maiorana	11,736.45			11,736.45
	470.45	539.90	851.39	1,861.74
January 19, 1973:-				
Payments to:				
Frank Maiorana		(5,669.00)	(1,335.00)	(7,004.00)
Anthony Maiorana		(3,750.00)	(1,250.00)	(5,000.00)
Transfer to Nabcor	1,100.00	(400.00)	(700.00)	
January 22, 1973:				
Proceeds from loan (Provident)		15,000.00	10,000.00	25,000.00
January 26, 1973:				
Transfer to Nabcor	5,000.00		(5,000.00)	
	6,100.00	5,181.00	1,715.00	12,996.00
	$ 8,275.45	$ 5,720.90	$ 2,566.39	$16,562.74

*Includes a $500.00 payment made on December 26, 1972.

Price Waterhouse & Co.

SIXTY BROAD STREET, NEW YORK, NEW YORK 10004 · 212-422-6000

April 6, 1973

To Paul, Weiss, Rifkind, Wharton & Garrison

At your request we have compiled an unaudited summary of loan, intercompany and Maiorana transactions for the period December 19, 1972 to January 31, 1973 from photocopies of what is purported to be the financial records of Nabcor Inc., consisting of the general ledger for the period August 1, 1972 to January 31, 1973 and the cash receipts and cash disbursements journals, and certain other related schedules, which were marked as deposition exhibits "Anthony Maiorana Exhibits 1, 3, 4, 5, and 6" in the action of National Auto Brokers Corp., et al., plaintiffs, against General Motors Corporation, et al., defendants. Inasmuch as we have not made independent verification of these records this compilation does not constitute an examination in accordance with generally accepted auditing standards and accordingly we express no opinion on the fairness of the amounts included therein.

Our work consisted of the following for the period December 19, 1972 to January 31, 1973:

1. We reviewed the Nabcor cash disbursements and the Nabcor cash receipts journals for all transactions with Pocono Futures, Leisure Life and the Maioranas.
2. We reviewed schedules of Pocono Futures and Leisure Life for all transactions with Nabcor and the Maioranas. These schedules did not show transactions for any period prior to January 1, 1973.
3. We traced and agreed all items extracted from the receipts and disbursements journals of Nabcor to the general ledger.
4. We analyzed the loan and officers' salary general ledger accounts of Nabcor.
5. We reviewed the cash receipts journal and cash disbursements journal for material loans from, and repayments to outsiders.
6. We summarized the loans, intercompany and Maiorana transactions as extracted from the cash journals and the prepared schedules to show the net effect of borrowings from outsiders.

This compilation was made for its sole use in the action of National Auto Brokers Corporation against General Motors Corp., et al.

Price Waterhouse & Co.

WSJ 5/6/75 p. 35

Steps Taken to Bar Contingent Fees Paid to Accountants

• • •

Under Plan, It Would Become Unethical to Get Funds For Help in Legal Case

By a WALL STREET JOURNAL *Staff Reporter*

NEW YORK—The accounting profession, a frequent target for class-action lawsuits, is taking steps to bar accountants from helping to press such lawsuits in return for a piece of the action.

Under a proposed ruling, it would become unethical for an accountant to serve as an expert witness or do litigation research for a contingent fee. According to the American Institute of Certified Public Accountants, the change is intended to buttress the accountant's independence by eliminating a possible bias in expert testimony.

"Our concern is that the accountant at all times be objective and not have a financial stake in the outcome," said Donald Schneeman, the institute's general counsel. "This (concept) is a very hard thing for lawyers to grasp," he added.

Already there are howls of protest from the "plaintiff's bar," the lawyers who specialize in bringing shareholder suits against big corporations or their auditors. They say the ethics ruling would deny them expert accounting witnesses because, in their view, it is impractical to bring class actions unless lawyers and their supporting experts work for contingent fees—a percentage of whatever damages they recover.

In a class action, the plaintiff—a shareholder charging fraud, for instance—brings suit on behalf of all his fellow shareholders. The damages sought by this "named plaintiff" may be relatively small, but the sum claimed on behalf of the entire class may total millions of dollars. The class's lawyer works for a share of the recovery, a portion that typically runs 10% to 25%, subject to court approval.

Proponents of class actions contend the device offers the only effective protection for small investors, whose individual claims are too meager to support a lawsuit. In rebuttal, critics argue that class members typically recover only a pittance, and the sole beneficiary of a class action is the lawyer who brings it.

In recent years, literally hundreds of class actions have been brought against accounting firms. Accountants complain that they are pegged as the "deepest pocket"—the most solvent would-be defendants when disgruntled investors are looking around for somebody to sue.

The accountants' code of ethics already bars working for contingent fees, but it makes an exception for fees "fixed by courts or other public authorities" (as well as for accountants representing clients in tax proceedings). The proposed ruling asserts that the exception for court-set fees wasn't meant for class actions. Rather, it applies only where an accountant, in effect, is working for the court itself, as in a bankruptcy reorganization. The ruling, approved last week by an institute committee, is being circulated for comment.

Melvyn I. Weiss, a New York lawyer who has brought numerous class actions against accounting firms, denounced the proposal as "a clear attempt to emasculate the ability of small stockholders to obtain a remedy" against auditors and their clients. It is obviously impractical, he said, for a plaintiff with a $5,000 individual claim to hire a first-rate accounting firm as expert witnesses. Currently, Mr. Weiss said, accounting experts typically get 10% to 20% of the fees awarded by the court. Only a handful of firms are willing to serve as experts for the plaintiff's side, he said.

Exhibit F

LES SEPLAKI, PhD

Economist

(212) 687-0999

Suite 303E
Pan Am Building
200 Park Avenue
New York, New York 10017

JA 143

September 5, 1975

DEAR ATTORNEY -

May we take this opportunity to inform you of the availability of our ECONOMIC CONSULTING SERVICES to attorneys. While we endeavor to perform a variety of services, such as research concerning utility rate regulation, the estimation of pecuniary damages emanating from employment discrimination, and patent related matters, our main preoccupation appears to center in antitrust and, in particular, on the determination of pecuniary losses in personal injury (reduced performance capacity, disability, and wrongful death) cases.

Our service in connection with PERSONAL INJURY litigation normally has two phases. (a) Upon obtaining a certain amount of information and data from you, we research the economic issues, gather statistics, and prepare a Pecuniary Damage Report. This Report contains our estimate of the economic damages incurred by the parties and as such may be used in settlement negotiations or in related procedures. (Our defense oriented service in this regard includes the examination and evaluation of, and reporting upon, any economic reports which may have been submitted by experts on the other side). We usually obtain the initial information pertaining to the case from the attorney. In addition, we often use one of our standard questionnaires and/or personally interview attorney's clients. The total fee for this phase of our service, in most cases, ranges between $200 and $250, is paid by the attorney, and includes the $100 retainer. (b) If the case is tried, we provide expert testimony in substantiation of our estimates. Our fee for this service is $50 per hour spent at court.

In connection with ANTITRUST related matters, we conduct relevant economic research, estimate damages, delineate markets, estimate market shares, report on the economic indicators of conspiracy and other antitrust violations. Our fee in these cases, as well as in cases relating to matters mentioned in the first paragraph, depends upon the nature and magnitude of the project involved; hence, it is determined by mutual agreement.

If you have any questions please do contact us. We think we know your needs and feel that we can accommodate you.

Respectfully yours,

Les Seplaki, PhD
Economist

LS/bs

Exhibit G

Amended Statement Pursuant to Rule 9(g) of the General Rules

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 144

----------x

CARL E. PERSON, :

Plaintiff, :

-against- :

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, :
SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, :
SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and :
ATTORNEY GENERAL OF NEW YORK STATE, :

Defendants. :

----------x

75 C 1473 (JFD)

AMENDED STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES

This amended statement is submitted by plaintiff pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York. Plaintiff contends that as to the facts listed below there is no genuine issue to be tried:

1. Plaintiff is a resident of Queens County, New York, in the Eastern District of New York, and has his office for the practice of law in New York County, New York, in the Southern District of New York.

2. Plaintiff has been and is the attorney of record, working on a wholly contingent-fee basis, for his 10 clients, who are the plaintiffs in a major, highly complex antitrust action against General Motors Corporation and others (the "Nabcor Action").

3. The first of 3 or 4 trials in the Nabcor Action is scheduled to commence in September, 1976.

4. Plaintiff and his clients are in substantial, present need of locating and retaining experts to testify at, and to prepare necessary accounting, survey, statistical, economic and marketing studies for, each of the 3 or 4 trials anticipated in the Nabcor Action, as set forth in ¶ 3 of my Supplemental Affidavit, sworn to April 15, 1976.

5. Plaintiff's clients are unable to pay the reasonable but substantial fees being asked by expert witnesses on a non-contingent basis to perform the work and give the testimony reasonably required of them to enable plaintiff to present his clients' side of the controversy in the Nabcor Action fairly and fully, as set forth in ¶¶ 4-7 of my Supplemental Affidavit, sworn to April 15, 1976.

6. The defendants in the Nabcor Action can afford to, and have retained and used and plan to use during the trials, experts to aid in their defense, drawn from firms of experts who have regularly served the defendants in the past and can be expected to serve them in the future.

7. Plaintiff and his 40 clients have already failed to use expert witnesses needed by them in the Nabcor Action to perform work and give testimony because of DR 7-109C, which prohibits plaintiff from using expert witnesses on any kind of contingent basis, as set forth in ¶¶ 8-9 of my Supplemental Affidavit, sworn to April 15, 1976.

8. Each of the defendants participates in enforcement of DR 7-109C and other rules and statutes applicable to plaintiff if he violates DR 7-109C, directly (by defendants other than the New York State Attorney

General) and indirectly (by the New York State Attorney General, under his authority to enforce § 90(2) of the New York Judiciary Law).

9. DR 7-109C clearly prohibits plaintiff from using expert witnesses in the Nabcor Action on any kind of contingent-fee basis:

(i) no matter how reasonable in amount;

(ii) no matter how probable the outcome; and

(iii) whether or not counsel in the same case are authorized (under DR 5-103A.2) to receive a fee contingent on the outcome of the case.

10. Some arrangement by plaintiff and his clients with expert witnesses to pay them reasonable fees on a contingent basis are possible, but for DR 7-109C, as set forth in ¶¶ 10-12 of my Supplemental Affidavit, sworn to April 15, 1976.

11. DR 7-109C unreasonably discriminates against plaintiff and his 10 clients in favor of the defendants in the Nabcor Action, as set forth in ¶ 13 of my Supplemental Affidavit, sworn to April 15, 1976.

12. The defendants in this present action deny in their pleadings and during oral argument by counsel that DR 7-109C is invalid or unenforceable.

13. It is unlikely in the extreme that plaintiff could hope to obtain a favorable ruling from the Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York ("Ethics Committee") that plaintiff could use expert witnesses in the Nabcor Action on a contingent-fee basis without ethical impropriety.

14. Without a ruling of some sort by the Ethics Committee, it is all but certain that plaintiff could not obtain experts willing to work on a contingent-fee basis, because of DR 7-109C, as set forth in ¶¶ 3, 10-12 of my Supplemental Affidavit, sworn to April 15, 1976.

15. If plaintiff found expert witnesses and used them on a contingent-fee basis in the Nabcor Action he would risk disciplinary proceedings by each of the defendants, under DR 7-109C and court rules of the 1st and 2nd Departments of the Appellate Division of the New York Supreme Court and criminal or other proceedings under § 90(2) of the New York Judiciary Law.

16. DR 7-109C is irrational and operates to discriminate against those who cannot afford expert testimony and tends to deny to the less affluent litigant access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious, as set forth in ¶ 13 of my Supplemental Affidavit, sworn to April 15, 1976.

17. There is an actual case or controversy between plaintiff and defendants under 28 U.S.C. § 2201, 42 U.S.C. § 1983 and the 1st and 14th Amendments to the United States Constitution.

18. The actions of defendants in adopting and/or enforcing DR 7-109C, directly or indirectly, constitute state action.

Dated: New York, New York
April 15, 1976

Respectfully submitted,

Carl E. Person

Carl E. Person, pro se
132 Nassau Street
New York, N.Y. 10038

(212) 349-4616

Memorandum and Order Dated June 25, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 148

- -X

CARL E. PERSON,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

75 C 1473
MEMORANDUM and ORDER

- -X

Appearances:

CARL E. PERSON, Esq., plaintiff pro se

HALIBURTON FALES, 2d Esq. (Messrs. WHITE & CASE and ROBERT H. HAILE, Esq., and DIANE S. LINKER, Esq., of Counsel) for The Association

DANIEL M. COHEN, Esq. (LOUIS J. LEFKOWITZ, Esq., Attorney General, of Counsel) for defendants other than the Bar Association, and for the Attorney General under Executive Law, § 71.

DOOLING, D.J.

Plaintiff has now moved for summary declaratory judgment invalidating Disciplinary Rule 7-109(c) forbidding lawyers' paying or acquiescing in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Plaintiff asks further, if that relief is granted, for a severance of the part of

the case dealing with the Disciplinary Rule (to be denominated 75 C 1473 A), dispensing with the need for an answer to the severed case, and granting other relief as appropriate. Plaintiff's motion, in substance, relies on what was said in the earlier Memorandum and Order (March 24-25, 1976) at pages 10-15.

The defendant Association argues that there is not a constitutionally sufficient controversy to authorize federal judicial intervention since it is not plainly shown that an expert would be available if the Rule were inoperative, or, indeed, that in the Nabcor case expert testimony is necessary or expected to be used or useful. Further, the defendant Association argues that on issues of principle courts must be slow to issue declaratory judgment, particularly where, as it contends is the case here, no evidentiary demonstration of irrational or discriminatory operation of the Rule has been made.

The posture of such a case as this is, inevitably, unusual. The Rule, unless ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go far to deny to the lawyer the opportunity to demonstrate the

availability of such testimony and its specific place in particular cases. But plaintiff has shown without contradiction that in his prosecution of the Nabcor case he is disadvantaged in being unable to retain needed accounting and economic testimony because of his clients' lack of funds and the inhibition of the Rule. The plaintiff has shown, without contradiction, that in his type of practice the predicament is recurrent from case to case. It is the plaintiff who is the one directly restricted by the Rule and rendered less effective than, in his reasonable judgment, he would be if able to seek out expert testimony uninhibited by the constraint of the Rule so far as it outlaws compensation contingent upon the outcome of the case. However, although the constraint directly affects plaintiff, individually, in his practice of his profession, the consequence is no less directly experienced by the grievant of limited or nil means who appeals for judicial relief and cannot obtain it in the measure in which it is available to those who can afford to retain experts in the kinds of cases in which expert testimony is either essential or necessary to the best and most effective presentation of the litigant's case.

The interests involved are, first, the interest of plaintiff and every other lawyer in being able freely to seek out and, on his clients' behalf, contract on a contingent fee basis with qualified experts where that is the only way in which the client can afford to engage the expert's services or the way which is otherwise appropriate, and, second, the client litigant's interest in having genuine access to the courts. The first interest is derivative from the second, but while the disciplinary rule, of necessity, directly affects the lawyer, it affects the client's underlying interest more drastically. In comforting theory the lawyer can turn his back on such clients and seek other work. But the client has no alternative to seeking justice except the courts established to dispense it.

The case, then, falls in the area considered in Boddie v. Connecticut, 1971, 401 U.S. 371; Lindsey v. Normet, 1972, 405 U.S. 56, 77-79, and United States v. Kras, 1973, 409 U.S. 434, but raises other considerations as well. Kras should, perhaps, be put aside at once: it rested on the announced constitutional permissibility of denying

to the indigent the benefits of the banktuptcy law available to those whose need of those benefits was a little less exigent - on the assumption that alternatives to bankruptcy appeared to be available. (As to Kras, See The Supreme Court, 1972 Term, 1973, 87 Harv.L.Rev. 1,57-67).

The Rule in its present form authorizes lawyers to advance, guarantee, or acquiesce in the payment of a reasonable fee for the professional services of an expert. The Rule further forbids the lawyer to offer to pay, or acquiesce in the payment of compensation to a witness "contingent upon the content of his testimony." So much seems plain; at least no ground of criticism of it appears. The difficulty is with the Rule so far as it forbids payment "contingent upon ... the outcome of the case." The Rule necessarily means that even if the fee agreed upon is reasonable and is not linked to the content of the testimony, the fee arrangement is improper.

It must be doubted that there is total compliance with the Rule in its present form. The case in which the unsuccessful personal injury plaintiff's lawyer goes unpaid must not infrequently be also the case in which the expert medical witness does not press either the plaintiff

or his lawyer for payment. Apart from that, however, litigation today calls for the use of many kinds of experts in many kinds of cases. The most obvious are the personal injury cases requiring medical testimony, malpractice cases against practitioners in various professional fields, product liability cases involving questions of design, malfunction and defect, patent and copyright cases, desegregation cases, obscenity control cases and other kinds of cases in addition to anti-trust cases. Disparity in means between the litigants is not always present, nor is total inability to pay a needed expert the common situation. But disparity and need are frequent, and, although contingent fee arrangements, if licit in principle, would not be available only to the indigent, it is inherent in the Rule that it must particularly forbid to the less affluent and to the indigent a means of obtaining an equal hearing to that accorded to a more affluent adversary in the same case. In the case where one party is of limited means the "discrimination" in treatment is individual, pointed and specific as well as general in its tendency to handicap the less affluent and the indigent classes of litigants in their efforts to vindicate their rights.

Yet a litigant, although without means, can obtain any lawyer whom the merits of his claim will attract to his case. But he may not obtain any expert whom the merits of his case can attract to study it and testify to his opinion.

The purpose of the prohibition, to remove an incentive to untruthful testimony, is not likely to be achieved by the Rule, and, to the extent achieved, would be gained at too great a loss in fundamental fairness. An incentive to untruthful testimony is implicit in any payment to a witness "for" his testimony. The Rule recognizes the risk in requiring that payments to expert witnesses be reasonable in amount. That, it must be inferred, means an amount related to time spent, difficulty of the problem, inconvenience imposed because of the nature of judicial proceedings, and such factors, but must never be such an amount that the inference is that the expert has been paid to give testimony of a certain content and not simply an appropriate fee for his time, effort and court attendance. But the Rule makes an unreasoned transition in outlawing the retainer of an expert on a contingent basis no matter how reasonable his fee would be

if success attended his client and he was paid his agreed fee. No basis in reason exists for rejecting a reasonable fee arrangement simply because the fee is not to be paid if the client does not prevail in the case. And there is no fair ground for excluding from the determination of reasonableness a consideration of the circumstance that the fee is contingent and not payable in all events. It is not meant to suggest that in the case of the expert a fee measured as a percentage of the recovery might not generally or in particular cases be regarded as per se unreasonable. But it is concluded that to treat contingency of payment as in and of itself improper is too irrational to survive Fourteenth Amendment analysis. The interest in access to the courts on a basis of equality may not exact redress of every imbalance that disparity of means can produce, but it is of such fundamental importance that it cannot be subjected to a constraint that is not adapted to effective achievement of its professed goal and which exacts a sacrifice which must, in any case, be disproportionate to the merely conjectured probability of occurrence of the wrong aimed at. Cf. Boddie v. Connecticut, supra, 401 U.S. at 377, 379-380; Winters v. Miller, 2d Cir.

1971, 446 F.2d 65, 71.

It follows that plaintiff's motion for leave to amend and for a summary declaratory judgment that Disciplinary Rule DR7-109C, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case is invalid, must be and it is granted. Since the issue is plainly involved with the remaining anti-trust issues, however, it would not be appropriate to sever the issue or enter a separate judgment on the issue before the entry of final judgment in the case.

Brooklyn, New York

June 25, 1976.

U. S. D. J.

Notice of Motion Dated July 23, 1976

COPY OF THE ... RECEIVED DEPARTMENT OF ... JUL 23 1976 NEW YORK CITY OFFICE Louis J. Lefkowitz ATTORNEY GENERAL

JA 157

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL E. PERSON,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, SUPREME COURT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

75 C 1473 (JFD)

NOTICE OF MOTION

TO: MESSRS. WHITE & CASE
Attorneys for The Association of the Bar of the City of New York
14 Wall Street
New York, N.Y. 10005

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York, pro se and as attorney for all other defendants
By: Daniel M. Cohen, Esq., Assistant Attorney General of the State of New York
Two World Trade Center - 47th Floor
New York, N.Y. 10047

PLEASE TAKE NOTICE that, upon the annexed affidavit of Carl E. Person, sworn to July 23, 1976, and all pleadings and proceedings herein, plaintiff will move this Court before Hon. John F. Dooling, in Courtroom 8 at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on August 3, 1976, at 9:30 a.m. or as soon thereafter as plaintiff and defendants' counsel can be heard, for an Order

(i) under Rule 56(a), F.R.Civ.P., granting a summary judgment in favor of plaintiff and against each of the defendants on plaintiff's action for a declaratory judgment relating to validity and/or enforceability of Disciplinary Rule 7-109(C), declaring the rule invalid and unenforceable in accordance with the Memorandum and Order of this Court dated June 25, 1976, and entering final judgment in accordance therewith, without costs to any party;

(ii) under Rule 41(a)(2), F.R.Civ.P., dismissing without prejudice and without costs to any party all claims not adjudicated by grant and entry of the final judgment described in subparagraph (i) above; and

(iii) granting such other and further relief as may be deemed just and proper.

Dated: New York, New York
July 23, 1976

Yours, etc.

Carl E. Person

Carl E. Person, pro se
132 Nassau Street
New York, N.Y. 10038

(212) 349-4616

Affidavit in Support of Motion for Summary Judgment and Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 159

- -x

CARL E. PERSON, : 75 C 1473 (JFD)

Plaintiff, : AFFIDAVIT IN SUPPORT

-against- :

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, :
APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, :
APPELLATE DIVISION, SECOND DEPARTMENT, SUPREME COURT, and :
ATTORNEY GENERAL OF NEW YORK STATE, :

Defendants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL E. PERSON, being duly sworn, deposes and says:

1. I am the plaintiff, am fully familiar with all facts stated herein and all prior proceedings, and make this affidavit in support of my motion for a summary declaratory judgment under Rule 56(a), F.R.Civ.P., for the grant and entry of a final judgment declaring that DR 7-109(C) is unconstitutional and unenforceable, in accordance with the Memorandum and Order of this Court, dated June 25, 1976, and for a dismissal of all other claims, under Rule 41(a)(2), F.R.Civ.P., without prejudice and without costs.

2. As a result of the Memorandum and Order dated March 24, 1976 and the Memorandum and Order dated June 25, 1976, any further litigation of the

issues remaining in the action would not be worthwhile to pursue, in absence of any change in circumstances. The Ethics Committee of The Association of the Bar of the City of New York has given to me two opinions on the ethical propriety of my financing plan, and the opinions seem satisfactory to me at this time. I have followed the suggestions set forth in the second opinion, dated July 2, 1976 (a copy of which is annexed hereto as Exhibit A), by amending the Thee Offering Circular, and the amended Notification and Offering Circular under Regulation A have become effective, on July 23, 1976.

3. I therefore respectfully request that my motion be granted in its entirety, without costs to any party.

Carl E. Person

Subscribed and sworn to before me
this 23rd day of July, 1976.

Notary Public

IRA J. EHRLICH
NOTARY PUBLIC, State of New York
No. 31-4600012
Qualified in New York County
Commission Expires March 30, 1978

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

JA 161

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

ALVIN H SCHULMAN
CHAIRMAN
200 PARK AVENUE
NEW YORK 10017
867-5500

RICHARD CASHMAN
SECRETARY
200 PARK AVENUE
NEW YORK 10017
867-5500

July 2, 1976

Carl E. Person, Esq.
132 Nassau Street
New York, New York 10038

Re: Reference No. 75-51(a)

Dear Sir:

In response to your letter of May 17, 1976 the Committee has reviewed your proposed Offering Circular in light of the provisions of the Code of Professional Responsibility relating to advertising and solicitation (DR 2-101(a) et seq.) and has limited its review principally to the material appearing under the caption "ATTORNEYS FOR THE PARTIES TO THE THEE ACTION". We believe it would be more in keeping with those requirements of the Code were you to limit the material under that caption, in substance, to a statement of the respective dates of admission to practice of yourself and Mr. Prentiss; to a statement of the number of lawyers engaged in practice at each of the firms representing the defendants; to information similar to that provided as to yourself and Mr. Prentiss, with respect to the attorneys in charge of the litigation for each of the defendants, if known to you; to a statement that there is no assurance that any of the listed attorneys or firms (including presumably, yourself and Mr. Prentiss) will remain attorney of record throughout the litigation since all litigants have the right to terminate the engagement of any lawyer at any time; and, finally, to a statement that it is not possible to predict or describe the effectiveness with which counsel will present the merits of their respective client's cases nor the bearing, if any, on the outcome of the litigation, of the varying degrees of effectiveness and experience of counsel.

Exhibit A

In making these observations, we have not passed on any question of law or any other issue raised by the Offering Circular, such as the propriety of your acting both as counsel to Mr. Thee in his lawsuit and as trustee of the funds collected by means of the offering. We also note that the reports to the financial press you intend to make from time to time as trustee under the terms of the Offering Circular may raise questions in the future in light of the rules prohibiting advertising and solicitation; but we are not in a position to pass on those questions at this time. Finally, as you know, the question of advertising by lawyers is a matter of recent debate, and the provisions of the Code applicable to your inquiry possibly may be modified as a result.

This opinion is for your information and for the information of our counsel, White & Case, Esqs., and the Court, should you decide to present it to the Court, but is not, as is true of all our informal responses to written inquiries, for general publication.

Very truly yours,

Alvin H. Schulman

Alvin H. Schulman
Chairman

cc: White & Case, Esqs.

Affidavit in Opposition to Motion for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 163

----------X

CARL E. PERSON,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF THE STATE OF NEW YORK

Defendants.

----------X

75 C. 1473
J-Pdg.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DANIEL M. COHEN, being duly sworn, deposes and says:

1. He is an Assistant Attorney General assigned to the defense of this action on behalf of the defendants other than the Association of the Bar. He makes this affidavit in opposition to the motion for summary judgment returnable August 3, 1976.

2. He opposes so much of the motion as seeks summary judgment against the defendants he represents. The clear implication of the Appellate Division rules challenged is that in their very general terms they are intended to apply to and to incorporate only those disciplinary rules of the Code of Professional Responsibility which are valid and enforceable. See First Department Rule 603.2 and Second Department Rule 691.2. There is, therefore, no necessity for this Court's judgment to incorporate any provision declaring either of the Court's rules to be, pro tanto, invalid or unenforceable.

3. In the event that the District Court deems it essential to disregard the position set forth on behalf of the Court defendants in paragraph 2 hereof, we shall continue to assert that there is no constitutional objection to the enforcement of the State Court rules, when correctly interpreted. In the event that our interpretation of our own Rules is respected, it will not be necessary to challenge this Court's interpretation of those Rules by an appeal from the judgment to be entered herein. See Law Students Research Council v. Wadmond, 401 U.S. 154 (1971). As noted in the Law Students case (401 U.S., at pp. 162-163):

> "the appellees are the very state authorities entrusted with the definitive interpretation of the language of the Rule. We therefore accept their interpretation, however we might construe that language were it left for us to do so. If the appellees be regarded as state courts, we are of course bound by their construction. See e.g., Baggett v. Bullitt, supra at 375; Kingsley Internation Pictures Corp. v. Regents of the University, 360 U.S. 684, 688; Speiser v. Randall, supra at 519; Terminiello v. Chicago, 337 U.S. 1, 5-6. If they are viewed as state administrative agencies charged with enforcement and construction and the Rule, their view is at least entitled to 'respectful consideration,' Fox v. Standard Oil Co., 294 U.S. 87, 96 (Cardozo, J.) and we see no reason not to accept their interpretation in this case."

4. We have no objection to the severance of this action and to the entry of a correct final judgment in accordance with this Court's memorandum of June 25, 1976. We request, however, that to avoid repetitious litigation of the claims withdrawn by the plaintiff that dismissal of all claims not adjudicated be with prejudice to their reassertion.

WHEREFORE, plaintiff's motion should be denied to the extent indicated in this opposing affidavit.

Daniel M. Cohen

DANIEL M. COHEN

Sworn to before me
this 26th day of July, 1976

Samuel A. Hirshowitz

Assistant Attorney General
of the State of New York

Reply Affidavit in Further Support of Motion for Summary Declaratory Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 166

CARL E. PERSON,	:	
Plaintiff,	:	75 C 1473 (JFD)
-against-	:	REPLY AFFIDAVIT
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL E. PERSON, being duly sworn, deposes and says:

1. Affiant is fully familiar with all the facts stated herein and all prior proceedings, and makes this reply affidavit in further support of his motion for (i) a summary declaratory judgment on the constitutionality of DR 7-109(C); and (ii) a voluntary dismissal of all other claims, without prejudice.

2. In ¶ 2 of his opposing affidavit, Mr. Cohen asserts that summary (declaratory) judgment should not be entered against any of the defendants represented by him. But his arguments are not at all persuasive. The Appellate Division Rules in question purport to (i) incorporate by reference all Disciplinary Rules, whether valid or not, adopted or enforced by

Defendant The Association of the Bar of the City of New York ("Defendant Bar Association"); these rules were derived from the New York State Bar Association, according to Messrs. White & Case, and the New York State Bar Association derived them from the American Bar Association; and (ii) provide sanctions for the violation of any of such Disciplinary Rules. The validity of such Disciplinary Rules is purportedly determined by the Court Defendants, among other courts, either (i) in connection with their adoption through incorporation by reference; or (ii) during litigation or disciplinary proceedings, occurring after adoption or incorporation of the rules. Mr. Cohen makes no showing of any decisions, opinions or other interpretations by either of the two Court Defendants rendered prior to this Court's two opinions on the matter declaring any of the Disciplinary Rules unconstitutional or unenforceable, and all lawyers in New York City have been required over the years (under threat of disbarment, etc.) to abide by DR 7-109(C) as well as all other Disciplinary Rules by virtue of the Rules of the Court Defendants and § 90(2) of the New York Judiciary Law, which Mr. Cohen now asks this Court to disregard. Plaintiff seeks a declaration of invalidity of the Court Defendants' Rules only to the extent that such Rules (on their face or by prior published decisions or opinions) purport to require attorneys to abide by all Disciplinary Rules, including DR 7-109(C).

3. Mr. Cohen claims that "the clear implication of the Appellate Division rules challenged" (emphasis supplied) is to incorporate only valid and enforceable Disciplinary Rules, but he does not point to any independent, prior interpretation of the Rules by any of his client-defendants which excludes DR 7-109(C) from being incorporated into the Appellate Division Rules in question. Until now, Mr. Cohen has always maintained in this

litigation that the Disciplinary Rule is valid and enforceable under § 90(2) of the New York Judiciary Law and the appropriate Rules of the Court Defendants. Thus, to the extent the New York Judiciary Law and Court Rules establish criminal penalties and other sanctions for violation of any Disciplinary Rules, the statute and Court Rules necessarily should be declared unenforceable as to Disciplinary Rules which the New York Attorney General and New York Appellate Divisions, through their respective statutes and Rules, have maintained are enforceable, to give plaintiff the full relief he seeks and needs. Without such relief, the decision could not have the full effect of binding the defendants to the declaratory judgment.

4. Mr. Cohen does not now refer to § 90(2) or any other provisions of the New York Judiciary Law. Presumably, he is arguing that a summary declaratory judgment is not appropriate in this action because § 90(2) impliedly excludes any Court Rules which are unenforceable. If this argument is valid, there would be no need for a summary declaratory judgment against Defendant Bar Association, on the assumed legal theory that an invalid rule needs no declaration of invalidity. Such argument is circular and invalid. The Court Defendants are in the same posture as a legislature seeking (through state officials) to avoid a declaratory judgment by arguing that an unconstitutional statute needs no judgment declaring the statute unenforceable because the statute is unenforceable anyway. Mr. Cohen's argument would have validity if the Disciplinary Rules were adopted and enforced independently of § 90(2) and the Court Rules in question. But such is clearly not the case. The Disciplinary Rules are enforced by the New York Courts as a result of the statute and Court Rules, which is the reason that such statute and Court Rules should be declared unconstitutional, to the extent they incorporate DR 7-109(C). Among other things, a declaration

of invalidity to the requested extent would ensure the availability of information about the lack of enforceability of such statute and Court Rules to other attorneys under our legal system for distributing and locating legal precedents.

5. Plaintiff does not seek any relief inconsistent with continued assertion by the Court Defendants "that there is no constitutional objection to the enforcement of the State Court rules, when correctly interpreted", as long as this means the State Court rules will not be enforced as to any Disciplinary Rule declared invalid by this Court and this Court renders a summary declaratory judgment to such effect.

6. Neither the Appellate Divisions nor the New York Attorney General ever considered, prior to this litigation, the issue of whether DR 7-109(C) is unconstitutional, and the Court Defendants and the New York Attorney General have given no "interpretation" within the meaning of the term as used in Law Students Research Council v. Wadmond, 401 U.S. 154 (1971). Mr. Cohen's new argument is not an "interpretation" within the meaning of Wadmond. Mr. Cohen's argument assumes that the New York State Legislature and the Court Defendants, without an independent review, have delegated to Defendant Bar Association the total authority to enact Rules having the force of law (New York statute and Court Rules) without judicial or legislative review of any kind. Assuming the argument is an "interpretation" of the Wadmond type of the kind being asserted by Mr. Cohen, the New York statutes and Court Rules in question should be declared unconstitutional in their entirety under the 14th Amendment as (i) an unconstitutional delegation of legislative power (or a statute authorizing such delegation; or

(ii) unconstitutionally vague, because the statute and Court Rules would then have to be read to prohibit lawyers from doing only what is subsequently to be declared illegal out of a list of possible prohibitions (i.e., all of the Disciplinary Rules), contrary to the Due Process requirements of the 14th Amendment. As criminal and quasi-criminal statutes and rules (incorporated by the criminal statutes), the statutes and rules should clearly spell out what is being prohibited, and not leave the determination of the prohibitions to subsequent determinations.

7. Plaintiff seeks to dismiss other claims without prejudice, to avoid unnecessary litigation. The claims have only begun to be litigated and no discovery has been sought or obtained by any party. Accordingly, any resumption would involve no substantial repetitive litigation. As a practical matter, it is not anticipated that litigation will be resumed; but if litigation does resume, any dismissal with prejudice could unduly prejudice and limit plaintiff by imposing unwarranted and costly obstacles to prevent speedy, just and inexpensive resolution of any renewed issues. Also, it should be noted that the claims in Count 1 of plaintiff's (amended) complaint involve a controversy between plaintiff and Defendant Bar Association only, and not any of the Defendants represented by Mr. Cohen.

WHEREFORE, plaintiff's motion should be granted in its entirety.

Carl E. Person

Subscribed and sworn to before
me this 28th day of July, 1976.

Notary Public

IRA J. EHRLICH
NOTARY PUBLIC, State of New York
No. 31-4600212
Qualified in New York County
Commission Expires March 30, 1978

Affidavit of Haliburton Fales, 2d, in Opposition to Motion for Summary Judgment

JA 171

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

CARL E. PERSON, :

Plaintiff, :

-against- : 75 C 1473 (JFD)

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT APPELLATE DIVISION, SECOND DEPARTMENT, SUPREME COURT, and ATTORNEY GENERAL OF NEW YORK STATE, : AFFIDAVIT

Defendants. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HALIBURTON FALES, 2d, being duly sworn, deposes and says:

1. He is a member of the firm of White & Case and of the bar of this Court. He is counsel for the defendant Association of the Bar of the City of New York. He makes this affidavit in opposition to the motion for summary judgment now returnable August 6, 1976 at 4:30 P.M.

2. The Association of the Bar is only a defendant in this case because it is charged with certain disciplinary responsibilities by the Appellate Divisions of the Supreme Court of the State of New York, who are represented by the Attorney General. In view of paragraphs 2 and 3 of the Attorney General's affidavit sworn to July 26, 1976, the case is moot as to the Association of the Bar

and no judgment need be entered except one dismissing the case against the Association and the other defendants.

We join in the relief requested in paragraph 4 of the Attorney General's affidavit, adding only that there is no showing of any likelihood of success on plaintiff's allegations of conspiracy, and there are state action immunities and First Amendment questions making success unlikely. A dismissal with prejudice would not operate to bar other persons from pursuing plaintiff's allegations but only avoid repetitious litigation by plaintiff.

I have also read plaintiff's reply affidavit of 28 July 1976 and draw to the Court's attention that plaintiff is entirely confused about the roles assigned to the various bar associations by the Appellate Divisions of the Supreme Court of the State of New York. Their Rules do not incorporate any Rules adopted by, or delegate any legislative authority to, the defendant Association of the Bar of the City of New York.

Haliburton Fales

HALIBURTON FALES, 2D

Sworn to before me this
30 day of July, 1976.

Robert A. Perkins

ROBERT A. PERKINS
Notary Public, State of New York
No. 31-7500 - Qual.
Certificate filed in New
Commission Expires March

Second Reply Affidavit in Further Support of Motion for Summary Declaratory Judgment

JA 173

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL E. PERSON,	:	75 C 1473 (JFD)
Plaintiff,	:	2ND REPLY AFFIDAVIT
-against-	:	
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT and ATTORNEY GENERAL OF NEW YORK STATE,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL E. PERSON, being duly sworn, deposes and says:

1. He is fully familiar with the facts stated herein and all prior proceedings, and makes this reply affidavit in further support of his motion for a summary declaratory judgment under Rule 56 (to declare DR 7-109C unconstitutional and unenforceable) and for a voluntary dismissal, under Rule 41(a)(2), without prejudice, of the other claims, now returnable August 6, 1976 at 4:30 P.M. (All parties have agreed to submit.)

2. Defendant The Association of the Bar of the City of New York ("Bar Association") is a defendant in this action because of its practice, as agent of New York State, to adopt and enforce the Disciplinary Rules adopted by the American Bar Association and the New York State Bar Association, neither

of which organizations has the authority in the Southern or Eastern District of New York, as agent of New York State, to enforce any of such Rules. At no time did Defendant Bar Association, as agent of the State, announce in any way that it was not going to enforce DR 7-109(C) or any of the other Disciplinary Rules, for that matter. To claim now that the Defendant Bar Association is entitled to a dismissal of the claims relating to DR 7-109(C) is absurd. Defendant Bar Association has been responsible, together with the other defendants, for the inability and failure of plaintiff, other attorneys and their respective plaintiff-clients to use expert witnesses on a contingent fee basis. To argue that defendants are not responsible because the Disciplinary Rule is being held invalid by this Court is absurd on the face of the argument, and a waste of time spent in making a response. All of the parties responsible for rejection of the published Disciplinary Rules including DR 7-109C are before this Court, and none of the defendants has ever taken the position that any of the Disciplinary Rules so published (regardless of origin) is invalid. The enforcement mechanism of Defendant Bar Association, paid for by New York State, is still doing business, and the Appellate Divisions continue to hear the disciplinary procedures prosecuted by Defendant Bar Association, or threatened to be prosecuted by virtue of the existence of the rules and enforcement mechanism. This enforcement procedure as to DR 7-109C should be stopped as of record, by granting of the relief requested herein. There is no other procedure available to plaintiff and the other members of the bar and their plaintiff-clients to have invalidity of DR 7-109(C) be declared for the benefit of plaintiff and all other persons who are entitled to know about the invalidity.

3. Defendant Bar Association may be claiming that its enforcement activities are derived solely from the Appellate Divisions, but this is not the

case. The Appellate Divisions have adopted without question (through case law, enforcement procedures and various rules) the Disciplinary Rules adopted and enforced by Defendant Bar Association. Also, Defendant Bar Association obtains New York State funds to pay for the enforcement procedure.

4. Defendant Bar Association would like to believe there is no showing of any likelihood of success on the conspiracy allegations, but Defendant Bar Association is wrong. A combination and/or conspiracy has been amply demonstrated, with the antitrust immunity issues becoming less likely to be resolved in favor of Defendant Bar Association by reason of Lawrence Cantor c/b/a Selden Drugs Co. v. The Detroit Edison Co., ___ U.S. ___ (decided July 6, 1976), ¶ 60,947 CCH Tr. Reg. Rep.

5. Plaintiff has sought and obtained no discovery, and no repetitious litigation of the issues to be dismissed would occur if plaintiff commenced another action. It readily appears from the history of this litigation that future litigation of such issues would be based on developments becoming known or occurring subsequent to today, and plaintiff should not be prejudiced as to such future developments by any dismissal on the merits as to facts not actually litigated which could be essential in future litigation.

6. The role of Defendant Bar Association in the adoption of Disciplinary Rules and interpreting them appears to be independent from the Appellate Divisons in some respects, but ultimate enforcement of such rules depends upon prosecution by the Attorney General or Bar Association before the Appellate Divisions, amounting to overlapping enforcement roles and rules. The New York courts say that the Appellate Divisions enforce each

of the Disciplinary Rules and none of the defendants has made any showing to the contrar. Affiant has already briefed the matter of how the Appellate Division rules incorporate the rules adopted and enforced by the Defendant Bar Association.

Carl E. Person

Subscribed and sworn to before
me this 4th day of August, 1976.

Notary Public

IRA J. EHRLICH
NOTARY PUBLIC, State of New York
No. 31-1600212
Qualified in New York County
Commission Expires March 30, 1977

Memorandum and Order Dated August 10, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JA 177

CARL E. PERSON,

Plaintiff,

- against -

75 C 1473

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

MEMORANDUM and ORDER

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ AUG 11 1976 ★
TIME A.M.....
P.M.....

Plaintiff has moved for an order dismissing counts one and two of his amended complaint without prejudice and entering final judgment in accordance with this Court's Memorandum and Order of June 25, 1976. The defendants contest the need for a declaratory judgment under 28 USC 2201. However, the Memorandum and Order of June 25, 1976, state fully the reasons for such a judgment. Defendants also assert that dismissal of counts one and two should be with prejudice. But, as plaintiff points out, no discovery has been sought or obtained on those claims, and there have been no proceedings of substance on those claims; therefore, no real reason appears to deny plaintiff's request for dismissal without prejudice of his causes of action against the defendants. Accordingly, it is,

ORDERED that counts one and two of plaintiff's amended complaint are dismissed without prejudice under F.R.C.P. 41(a)(2), and it is further,

ORDERED that the Clerk prepare a final judgment for the approval of the Court, that,

1) it is adjudged that Disciplinary Rule 7-109C of the Lawyers' Code of Professional Responsibility, as adopted by the New York State Bar Association, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional; and that

2) plaintiff take nothing on counts one and two, and that those counts are dismissed against all defendants, with costs as taxed by the Clerk.

Brooklyn, New York,

August 10, 1976.

U. S. D. J.

Judgment Dated August 12, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

M'FILMED

JA 179

CARL E. PERSON,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

JUDGMENT

75-C-1473

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ AUG 12 1976 ★
TIME A.M. .....
P.M. .....

A memorandum and order of Honorable John F. Dooling, United States District Judge, having been filed on August 11, 1976, dismissing counts one and two of plaintiff's amended complaint without prejudice pursuant to F.R.C.P. 41(a)(2) and directing the Clerk to enter judgment that

1) Disciplinary Rule 7-109C of the Lawyers' Code of Professional Responsibility, as adopted by the New York State Bar Association, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional; and that

2) plairtiff take nothing on counts one and two, and that those counts are dismissed against all defendants, with costs as taxed by the Clerk, it is

ORDERED and ADJUDGED that

1) Disciplinary Rule 7-109C of the Lawyers Code of Professional Responsibility, as adopted by the New York State Bar Association, and that rule as incorporated in Rule 603.2

of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional; and that

2) plaintiff take nothing on counts one and two, and that those counts are dismissed against all defendants with costs as taxed by the Clerk.

Dated: Brooklyn, New York
August 17, 1976

Clerk

By: Chief Deputy Clerk

Approved:
August 17, 1976

U.S.D.J.

Notice of Appeal

EASTERN DISTRICT OF NEW YORK

JA 181

CARL E. PERSON,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants.

16-1457

NOTICE OF APPEAL

75 C 1428

UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

T. 6-18

S I R:

PLEASE TAKE NOTICE that the defendants above-named, other than the Association of the Bar, appeal to the United States Court of Appeals for the Second Circuit from the judgment entered herein, dated August 12, 1976 and from each and every part thereof.

Dated: New York, New York
September 9, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney Pro Se and for
said defendants, the Appellate
Divisions of the Supreme Court
of the State of New York,
First and Second Departments

TO: CARL E. PERSON, ESQ.
Pro Se
132 Nassau Street
New York, New York 10038

White & Case, Esqs.
14 Wall Street
New York, New York 10005

BEST COPY AVAILABLE

10 Apr 76

2 Copies Received from C-E, 27 Apr 76